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THE
AMERICAN STATE REPORTS,

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY,

**SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN
DECISIONS" AND THE "AMERICAN REPORTS,"**

DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

By A. C. FREEMAN,
AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS."

VOL. XIII.

SAN FRANCISCO:
BANCROFT-WHITNEY COMPANY,
LAW PUBLISHERS AND LAW BOOKSELLERS.
1890.

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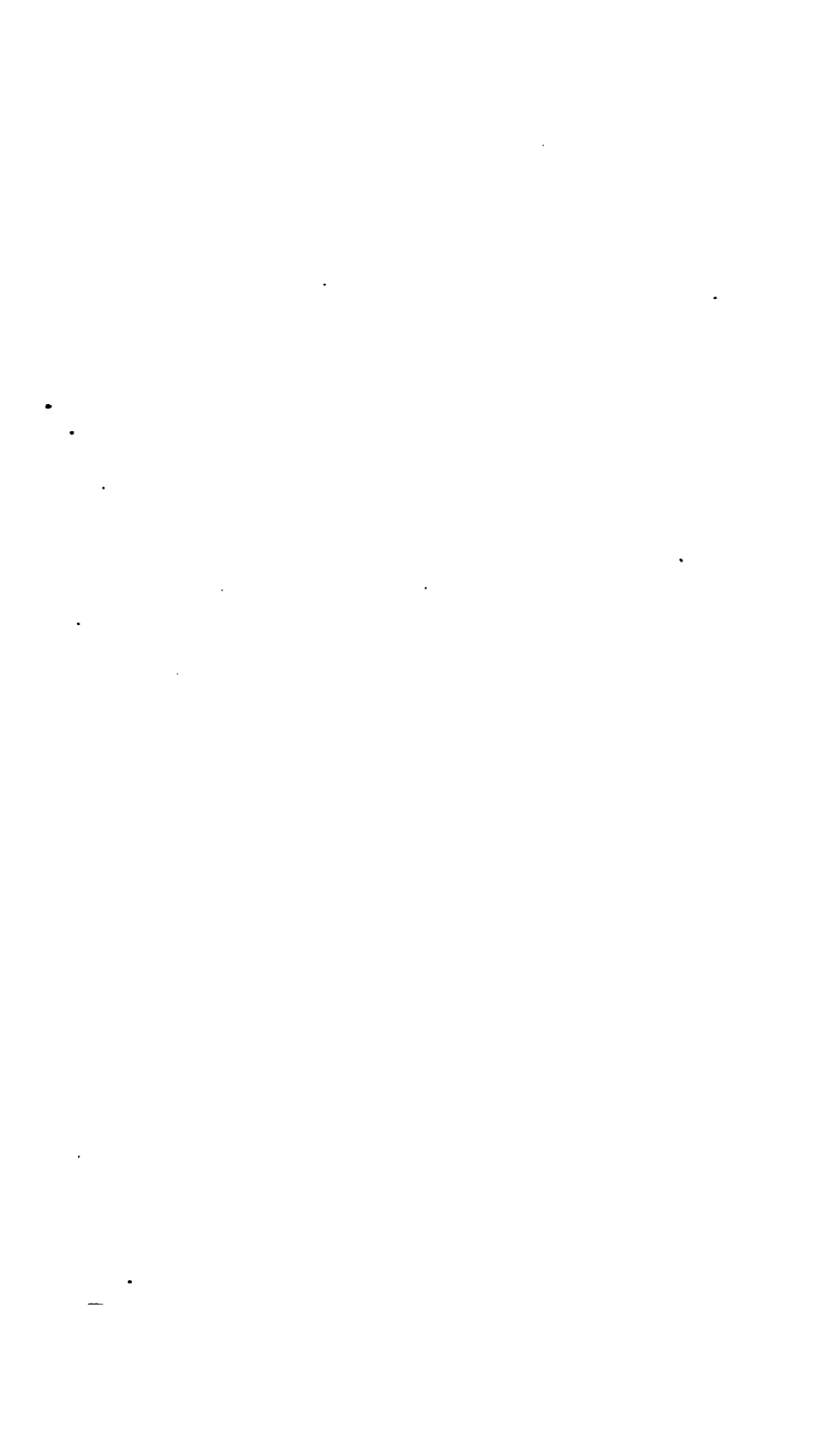
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AMERICAN STATE REPORTS.
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CASES
IN THE
SUPREME COURT
OF
ALABAMA.

EX PARTE BARKER.

[87 ALABAMA, 4.]

EXTRADITION — WHEN ILLEGAL ARREST IS NOT GROUND FOR DISCHARGE FROM CUSTODY. — A person illegally arrested in Georgia and brought into Alabama as a fugitive from justice, under extradition proceedings instituted in the latter state after his arrest, cannot claim to be released from custody on *habeas corpus* because of his illegal arrest, nor because of defects in the warrant on which the extradition proceedings were based, it appearing that the petitioner was held in custody by virtue of a *capias* issued on an indictment since found for the same offense, and that the executive authorities of Georgia, whose laws were violated by the illegal arrest, had made no complaint.

EXTRADITION. — MERE FACT THAT PRISONER, BEING FUGITIVE FROM JUSTICE, WAS KIDNAPED in another state, and brought into the state from which he fled, is alone no reason why he should be released, unless the demand for his release is made by the governor or other executive authority of such foreign state.

APPLICATION by William M. Barker for the writs of *habeas corpus*, *certiorari*, and other necessary remedial process, to procure his release from the custody of the sheriff and jailer of Elmore County. Application for a discharge was first made to the probate judge of said county, who refused to discharge the petitioner, and the application was renewed to this court upon grounds sufficiently appearing in the opinion.

Parsons, Darby, and Burney, for the petitioner.

William L. Martin, attorney-general, *contra*.

SOMERVILLE, J. The prisoner was arrested in the state of Georgia without legal process, and was afterwards handed

over by the officers of the law in that state into the custody of one McCain, who acted as agent of the state of Alabama, under a warrant issued by the governor of the latter state under the interstate extradition laws of the United States. This was done pursuant to a warrant of the governor of Georgia. These extradition papers are claimed to have been so defective as to confer no jurisdiction on any of the officers in whose custody the prisoner has been detained.

The return made to the writ of *habeas corpus* by the deputy sheriff of Elmore County shows that the petitioner was detained in his custody, not only under the authority conferred by these papers, but by virtue of a *capias* issued on an indictment for the offense of grand larceny,—the same crime for which he was extradited from the state of Georgia as a fugitive from justice from Alabama.

The proposition contended for by the petitioner's counsel may be reduced to this: that the petitioner is entitled to be discharged from custody, and should be allowed reasonable time to make good his escape again from this state, because he was illegally arrested in Georgia and brought into Alabama.

This proposition is not sound, and there is an overwhelming array of authority against it. We may admit that the affidavit charging the offense upon which the extradition warrant was based was fatally defective in omitting the word "feloniously" before the words "took and carried away," which purport to charge the crime of grand larceny, and for this reason the affidavit legally charges no crime. And we premise, also, that when the affidavit in such cases fails on its face to state facts which constitute a crime, the defect is jurisdictional, and may be ascertained and declared by the investigating tribunal, on an application for the writ of *habeas corpus*: U. S. R. S., sec. 5278; Spear on Extradition, 471, 472, 477, 498, 548; 7 Am. & Eng. Ency. of Law, 632, 637; *People v. Brady*, 56 N. Y. 182.

So, without affecting the merits of this case, it might be admitted, for the sake of argument, as contended, that the judge of the county court of Elmore County had no authority to issue a warrant for the arrest of a person for a felony, although it is obvious that he is invested by the statute with this authority as a lawful magistrate (Code 1886, secs. 4255, 4279, 4680), and although "an affidavit made before any magistrate of a state or territory," certified as authentic by

the governor of the demanding state, is obviously sufficient, if otherwise objectionable, under the federal statute governing the subject of the extradition of fugitives from justice between the states and territories: U. S. R. S., sec. 5278; Hurd on Habeas Corpus, 2d ed., 610.

It nevertheless is true that the courts of a state will not generally investigate, either on *habeas corpus* proceedings, or on final trial, the mode of the prisoner's capture, whether it was legal or illegal, whether it was under lawful process or without any process at all, where he has fled to another state or country, and been brought again into its jurisdiction. The question is the legality of the prisoner's detention, not the legality of his arrest, unless on the complaint of the governor of the state whose laws were violated by such unlawful arrest. The person making the arrest may be prosecuted criminally for kidnaping, or be held liable to respond in civil damages for false imprisonment; but the prisoner cannot himself claim to be released from any legal process for the same crime, under authority of which he may be detained in the custody of the law. In other words, the mere fact that the prisoner, being a fugitive from justice, was kidnaped in another state, — to put the case strongly, — and was brought into this state, is alone no reason why he should be released, unless the demand for release is made by the governor or other executive authority of such foreign state. This is the accepted doctrine of the state and federal courts, and is founded on an ancient and well-settled principle of the common law: Spear on Extradition, 181, 492, 554; 7 Am. & Eng. Ency. of Law, 643, 653, note; *Matter of Fetter*, 23 N. J. L. 402, 57 Am. Dec. 400, note, and cases cited; *Commonwealth v. Shaw*, 6 Crim. Law Mag. (1885) 245.

In *Ex parte Scott*, 9 Barn. & C. 446, a case of *habeas corpus*, the prisoner, a female, had been arrested at Brussels, without authority of law, and brought back to England. Lord Tenterden refused to inquire into the circumstances of her arrest, whether legal or illegal, upon its being made to appear that an indictment had been found against her in the proper jurisdiction in England, where the investigation occurred, and the crime was alleged to have been committed. It was not denied that the foreign country, whose laws may have been violated by the illegal arrest, could vindicate their breach by making demand for the prisoner's return.

In *Dow's Case*, 18 Pa. St. 37, the prisoner had escaped from

justice in Pennsylvania and fled to Michigan. He was arrested in the latter state, without legal authority, and brought back to the former state, where a prosecution was pending against him for forgery. He was held not to be entitled to his discharge, his release not being demanded by the executive of Michigan.

In *State v. Brewster*, 7 Vt. 118, where the prisoner had been kidnaped in Canada and forcibly brought into the state of Vermont, his discharge was refused, and he was held liable to answer an indictment for crime in the latter state.

A like ruling was made in *Ker v. People*, 110 Ill. 627, 51 Am. Rep. 706, in the case of one who had been seized by private persons in Peru, without warrant of law, and was brought to California and from thence to the state of Illinois by process of extradition. The authorities on the subject are ably reviewed in this case by Scott, J.; and the United States supreme court, on appeal to that tribunal, declined to disturb the judgment of the supreme court of Illinois: *Ker v. Illinois*, 119 U. S. 436; see also Spear on Extradition, 181-186; *Ker's Case*, 18 Fed. Rep. 167.

It is not denied that the crime of grand larceny described in the *capias* on the indictment against the prisoner, and under which the sheriff claims to detain him, is the same offense as that intended to be charged in the extradition warrant of the governor. There can be no serious question, under these circumstances, of the legality of the petitioner's detention under the *capias* on this indictment irrespective of all other questions discussed in the briefs of counsel: *Fetter's Case*, 23 N. J. L. 311; 57 Am. Dec. 382; 7 Am. & Eng. Ency. of Law, 627, 628.

The application for the writ of *habeas corpus* must be denied.

EXTRADITION. — Where one who was charged with crime in one state was brought by a requisition from another, it was immaterial that he was illegally and forcibly brought from a foreign country into the state from which he was extradited: *Ker v. People*, 110 Ill. 627; 51 Am. Rep. 706. Where a party was extradited from a foreign country on a criminal charge, he was subject to arrest, before he could return, on civil process: *Adrianos v. Lagrave*, 59 N. Y. 110; 17 Am. Rep. 317.

EXTRADITION. — As to the right to try extradited persons for other offenses, see *State v. Hall*, 40 Kan. 338; 10 Am. St. Rep. 200, and note 207-210.

EXTRADITION. — As to what matters in extradition proceedings may be inquired into by writ of *habeas corpus*, see *Kurtz v. State*, 22 Fla. 36; 1 Am. St. Rep. 173, and note 179. Compare *Ex parte Lewis*, 79 Cal. 96.

EXTRADITION. — For a general discussion of extradition proceedings, see note to *Matter of Fetter*, 57 Am. Dec. 389-400.

GUNTER v. STUART.

[57 ALABAMA, 196.]

AGENCY — AGENT CANNOT BIND PRINCIPAL BY ANY ADMISSION MADE AFTER TERMINATION OF AGENCY. — Authority of the clerk of a steamboat to make purchases for the boat, and to state accounts, necessarily terminates when his connection with the boat is severed, and after that time he cannot bind the owners by his written admission of the correctness of an account; and to obtain any information he may possess as to its correctness, he must be called and examined as a witness.

ACTION brought by Stuart against Gunter and others, late partners, doing business under the name of the Decatur and Chattanooga Packet Company, to recover for goods sold and delivered by the plaintiff to the defendants, through their agents, from July 7, 1883, to February 9, 1886, to or for the use of their several boats. At the trial, the plaintiff had his books in court, and produced a statement of account against each boat, showing the balance due on account, and at the foot of each of these statements were the written words, "This statement is correct," and signed "J. B. McKee, clerk." Several of these statements bore date in October 31, 1885, and the defendants introduced evidence showing that their partnership in the steamboat business was dissolved on October 5, 1885, and that McKee, who had been their clerk, quit their service in June, 1885. The defendants asked the following charges: "2. If the jury believe, from the evidence, that McKee was not in the employment of the defendants at the time he stated said accounts with plaintiff, then the defendants are not bound thereby"; "3. If the jury believe, from the evidence, that the defendants' partnership was dissolved and ceased to exist before McKee indorsed said accounts, then his acts do not and cannot bind the defendants." The court refused each of these charges, and the defendants assigned error.

Hunt and Clopton, for the appellants.

J. E. Brown, contra.

STONE, C. J. Part of Stuart's evidence, on which he relied for recovery against the steamboat company, the appellants, consisted in certain stated accounts, certified to be correct by one McKee, styling himself clerk. These certificates, several of them, bear date in October, 1885, and some of the items appear to be later than this. There was testimony tending to show that McKee ceased to be clerk or agent of appellants

about June 1, 1885, and that he was not afterwards in their employment. It is too clear to admit of argument that after McKee ceased to be clerk and agent of appellants he could neither do any act, state an account, or make an admission that would bind them. While the relation of principal and agent exists, the agent can bind his principal by any act done within the scope of his authority, and by any admission made contemporaneous with and explanatory of the act of agency so done: 3 Brickell's Digest, 25, secs. 107, 108. And it may be that, acting as clerk of the boat, it was within the purview of his duties to make purchases for the boat, and to state accounts. All these powers, however, would necessarily terminate when his connection with the boat was severed. To obtain, after that time, any information he might possess, he must needs have been made a witness. Charges 2 and 3, asked by appellants, ought to have been given.

Reversed and remanded.

AGENCY — DECLARATIONS. — ADMISSIONS OF AN AGENT are not evidence against his principal, unless they are made a part of the transactions of the agency; and if made at a time subsequent to the act, they are inadmissible: *Cobb v. Johnson*, 2 Sneed, 73; 62 Am. Dec. 457. Declarations and admissions of an agent, after termination of his authority, are not evidence against his principal: *Reynolds v. Rowley*, 3 Rob. (La.) 201; 38 Am. Dec. 233; *Franklin Bank v. Pennsylvania etc. Co.*, 11 Gill & J. 28; 33 Am. Dec. 687; *Roberts v. Burks*, Litt. Sel. Cas. 411; 12 Am. Dec. 325; *State Bank v. Johnson*, 1 Mill's Const. 404; 12 Am. Dec. 645; *Thalheimer v. Brinckerhoff*, 4 Wend. 394; 21 Am. Dec. 155; *Haven v. Brown*, 7 Greenl. 421; 22 Am. Dec. 208; *Hubbard v. Elmer*, 7 Wend. 446; 22 Am. Dec. 590; *Davis v. Whitesides*, 1 Dana, 177; 25 Am. Dec. 138.

AGENCY. — A principal is liable to third persons dealing with agents after the agency has ceased till they are notified of the termination of the agency: *Van Dusen v. Star Q. M. Co.*, 36 Cal. 571; 95 Am. Dec. 209; *Diversy v. Kellogg*, 44 Ill. 114; 92 Am. Dec. 154; *Tier v. Lampson*, 35 Vt. 179; 82 Am. Dec. 634, and note 637, 638; *Wheeler v. McGuire*, 86 Ala. 398. But after the termination of the agency, the principal is not bound to pay a draft drawn by his agent, and indorsed by third parties, although he had paid such drafts during the existence of the agency, and the indorsers had no notice of the termination: *Gronoweg v. Kunsorm*, 75 Iowa, 237.

**MOORE AND HANDLEY HARDWARE COMPANY v.
TOWERS HARDWARE COMPANY.**

[87 ALABAMA, 203.]

CONTRACTS — WHEN CONTRACT IS NOT AN UNREASONABLE RESTRAINT OF TRADE. — A contract entered into between two competing business firms, supported by a valuable consideration, whereby one sells its stock to its rival, and agrees to desist from further competition, is not void as being an unreasonable restriction on trade, when properly construed in connection with the attendant circumstances showing the limits of the territory covered by their previous competition.

CORPORATION IS LEGAL ENTITY, SEPARATE AND DISTINCT from the individuals who, from time to time, may be its stockholders, and is not affected by the personal rights, obligations, or transactions of its individual stockholders with third persons, whether such rights accrued or obligations were incurred before or after incorporation.

CORPORATION WILL BE CHARGED WITH ENGAGEMENTS ENTERED INTO BETWEEN ITS PROMOTERS in anticipation of incorporation and third persons, the benefits of which it has received and accepted, even in the absence of an express promise to perform or ratification on the part of the corporation after it is *in esse*. And where associates combine together to create a "paper corporation," thereby to free themselves from individual obligations, a court of equity will hold the nominal corporation to a discharge of such obligations.

INJUNCTION WILL NOT LIE TO RESTRAIN PRIVATE CORPORATION FROM VIOLATION OF CONTRACT entered into, prior to incorporation, by its principal corporators and stockholders upon their individual credit, when it is not alleged nor shown that the corporation was organized fraudulently for the purpose of evading obligations which the contractors had taken upon themselves as individuals.

BILL in equity filed by the Towers Hardware Company, a private corporation, against the Moore and Handley Hardware Company, another private corporation, asking an injunction against an alleged violation of a contract by the defendant. The plaintiff was incorporated in February, 1887, and the defendant, in March, 1888, each having its principal place of business in Birmingham, and engaged in the business of selling hardware throughout the northern counties of the state. The partnership of Moore, Moore, and Handley had previously been engaged in the same business, and in May, 1887, they sold out their entire stock of plow-stocks and plow-blades to the complainant for a valuable consideration, and agreed, in writing, in consideration of such sale, "not to handle any more plow-stocks or plow-blades"; and said partnership was composed of J. D. Moore, B. F. Moore, and W. A. Handley, who, as alleged, afterwards formed the defendant corporation, which succeeded to all the property rights and assets of said part-

nership, as well as all the liabilities thereof. The bill charged that the effect of the said Moores and Handley organizing said corporation would be to perpetrate a fraud on the complainant should they be allowed to handle plow-blades and plow-stocks; that the defendant's business, as conducted, was identically the same as that conducted by said Moores and Handley, being conducted by the same persons, in substantially the same manner as before; and that the only change in fact was in the name of the concern. It was further alleged that said Moores and Handley, in making said agreement with the complainant, meant and intended, and such was the complainant's intention, that they would not again engage in selling or handling plow-blades or plow-stocks in connection with their said business in the city of Birmingham so long as the complainant was engaged in the like business. The answer of the defendant admitted the contract between the complainant and the said Moores and Handley, as alleged, but denied that the defendant assumed the obligations of said partnership, or of its individual members, or that it succeeded to the property rights and assets of said partnership. It was alleged that one Wimberly owned a one-fourth interest in the corporation at its organization, admitting, however, that the Moores and Handley had since bought out his interest; and it was insisted that said contract was illegal and void, as being in restraint of trade, and, if valid, did not bind the defendant. Other facts appear in the opinion. The defendant's motion to dissolve the temporary injunction, and to dismiss the bill for want of equity, was overruled, and the defendant appealed.

Smith and Lowe, for the appellant.

Cabaniss and Weakley, contra.

MCCLELLAN, J. The equity of the bill so far as the injunction is concerned, and the sufficiency of those of its allegations which are not denied by the answer to sustain the injunction, depend primarily on two questions: 1. Whether the contract relied on is void, as being in unreasonable restraint of trade; and 2. Whether a negative undertaking entered into by persons who subsequently organize, and for the time constitute a corporation for the prosecution of the business with respect to which the contract was made, can be enforced by injunction against the corporation.

1. It is insisted that the agreement of Moore, Moore, and Handley "not to handle any more plow-blades or plow-stocks" is an unreasonable restriction on trade, in that it contains no limitation as to the place or locality at or in which they are to refrain from carrying on the specified business. It is true that such contracts must be limited as to the space they are intended to cover, or they cannot be supported. The meaning of a contract of this character, however, is not to be found solely from a consideration of its expressed terms. Courts look to all the circumstances surrounding the parties, and attendant upon the transaction, and from a consideration of these circumstances, in connection with the expressions of the undertaking, they will first construe the contract, and then proceed to pass upon its reasonableness as thus construed. In the case at bar, the facts were, that both parties were engaged in a certain business in and covering that part of the state of Alabama which embraces and lies north of the city of Birmingham. It was a character of business, as conducted by them, which could reasonably and naturally be carried on throughout the territory. Over this space they were dealing in competition with each other, and presumptively the operations of each were detrimental to the trade of the other, and the agreement of either to desist from these operations redounded to the advantage of the other. The bill alleges, and the answer does not deny, that the written agreement, copied above, was made with respect to the trade thus carried on in the territory including and north of Birmingham, in Alabama. The contract will therefore be construed with reference to these facts, and held to mean that Moore, Moore, and Handley would not handle plow-stocks and blades in competition with or opposition to the Towers Hardware Company within the territory covered by their previous competition, and described as that part of Alabama which includes and lies north of Birmingham. Thus construed, it becomes specific as to time, space, and character of the dealing intended to be restrained, and is reasonable and valid: *Hubbard v. Miller*, 27 Mich. 15; 15 Am. Rep. 153; *Curtis v. Gokey*, 68 N. Y. 300; *Warfield v. Booth*, 33 Md. 63; *Dethlifs v. Tomsen*, 7 Daly, 354; *Beal v. Chase*, 31 Mich. 490; *Havner v. Graves*, 7 Bing. 735; *Whittaker v. Howe*, 3 Beav. 383; *Tallis v. Tallis*, 1 El. & B. 391; *Morse Machine Co. v. Morse*, 103 Mass. 73; 4 Am. Rep. 513; *Oregon S. Nav. Co. v. Winsor*, 20 Wall. 64.

2. The general doctrine is well established, and obtains both

at law and in equity, that a corporation is a distinct entity, to be considered separate and apart from the individuals who compose it, and is not to be affected by the personal rights, obligations, and transactions of its stockholders; and this, whether said rights accrued or obligations were incurred before or subsequent to incorporation: *Morawetz on Private Corporations*, 227-234, 547-549; *Morrison v. Gold M. G. M. Co.*, 52 Cal. 309; *Hawkins v. Mansfield G. M. Co.*, 52 Id. 515; *Gent v. M. & Mut. Ins. Co.*, 107 Ill. 658; *Caledonian R'y Co. v. Helensburgh*, 2 Macq. 391; *Penn. Mat. Co. v. Hapgood*, 141 Mass. 147.

There is a class of contracts, however, which are entered into between the promoters or prospectors of a contemplated corporation and third persons, on the faith of the corporation, intended to inure to its benefit, and which in point of fact do inure to its benefit, on which the corporation will be charged, even in the absence of an express promise to perform, or ratification on the part of the company after it is *in esse*, on "the familiar principle that one who accepts the benefit of a contract which another volunteers to perform in his name and on his behalf is bound to take the burden with the benefit": *Redfield on Railways*, 5th ed., 18; *Edwards v. Grand Junction R'y*, 1 Mylne & C. 650; *Stanley v. Birkenhead R'y*, 9 Sim. 264; *Little Rock etc. R. R. Co. v. Perry*, 37 Ark. 164; *Perry v. Little Rock etc. R. R. Co.*, 44 Id. 383; *Bommer v. Am. Spiral Co.*, 81 N. Y. 468.

And in those cases where "associates combine together to create a paper corporation to cover a partnership or joint venture, and where the stockholders are partners in intention," and have resorted to the fiction of separate corporate entity to free themselves from individual obligations which had attached to them, with respect to the business they propose to carry on, prior to the organization of the company, courts of equity, when the ends of justice require it, will disregard and look beyond the fiction of corporate entity, and hold the corporation to a discharge of the liabilities resting on its members; and this may be done, although some of the shareholders had not originally incurred the obligation sought to be enforced, provided they had notice of it before entering the corporation, and participated in the effort to avoid it: *Davis Imp. Wrought Iron W. W. Co. v. Davis Wrought Iron W. Co.*, 20 Fed. Rep. 700; *Beal v. Chase*, 31 Mich. 490, 495, 532.

The contract of Moore, Moore, and Handley, sought to be

enforced against the Moore and Handley Hardware Company, was not an undertaking between promoters of the company and third parties, nor made on the faith of the corporation, nor intended to inure to its benefit, nor did it inure, in point of fact, to the benefit of the corporation. It is not of that class of contracts which courts enforce against corporations, on the ground that they were made in the corporate name by anticipation, and that the corporation received and accepted the benefits resulting from them.

There is no allegation of fraud made against the corporation, or its share-holders, and the implication of the fraudulent effect of the corporate action complained of is denied. It is not shown that this is a mere "paper corporation," to cover a joint venture, in which the corporators are partners in intention, and have resorted to this form for the purpose of evading and avoiding obligations which they had taken upon themselves as individuals, or for the purpose of evading the promise relied on here. If these things had appeared in the case, we should not hesitate to hold the corporation answerable for the individual obligation. But in the absence of fraud, "no authorities have gone the length of holding that any contract made with individuals, exclusively upon individual credit, will become the contract of any future corporation that may be formed for the more convenient management and use of the benefits of it": Little Rock etc. R. R. Co. cases, *supra*.

If the case of *Beal v. Chase*, *supra*, goes beyond this doctrine, we cannot indorse it. We do not think it does. In that case, the corporation had been formed for the purpose of violating a contract not to engage in a certain business. All the corporators were held to have participated in this purpose. The business was to be conducted by the corporation in connection with the promisor in his individual capacity. He had an interest in it, both individually and as the principal share-holder of the company; and the court enjoined the corporation, not generally, but from carrying on the business with or for the individual contracting party. To put the case at bar in line with that case, it would have to appear, not only that the corporators organized for the purpose, and with the intention of evading their contract, through the separate entity of corporate existence, but also that they reserved an interest in the business distinct from their interests as stockholders. None of these facts are shown. The effect of allowing the injunction in this case to continue would necessarily be to hold all

future share-holders in the corporation to the performance of a contract which neither they nor the corporation had ever entered into, and of which they may not even have had notice. Such a result could only be justified on the ground of bad faith in the creation of the company. To thus hamper a *bona fide* corporation would be inequitable, and have the effect of establishing a doctrine fraught with much danger to corporate rights, powers, and property.

The allegations going to show a ratification by the corporation of this contract of Moore, Moore, and Handley are denied by the answer, and hence cannot be considered in passing on the decree overruling the motion to dissolve the injunction. Those allegations of the bill which are not denied were not sufficient to authorize a continuance of the injunction, and the decree on that point was erroneous, and is reversed.

The contract relied on here is such a one as the respondent corporation could have made under its charter. It is, therefore, one which, being already in existence between complainant and the individuals composing the defendant company, the corporation had the power to ratify and adopt. The bill, in our judgment, sufficiently avers such ratification or adoption. These allegations give equity to the bill, and the decree overruling the demurrer is affirmed.

The cause will be remanded, with instructions to the chancellor to dissolve the injunction, unless the complainant amends its bill so as to entitle it to a continuance of the writ, under the principles we have announced.

Reversed and remanded.

CONTRACTS IN RESTRAINT OF TRADE. — The validity of contracts in restraint of trade is discussed in a note to *Angier v. Webber*, 92 Am. Dec. 751-765; note to *Smalley v. Green*, 35 Am. Rep. 269-272; compare also *Hodge v. Sloan*, 107 N. Y. 244; 1 Am. St. Rep. 816; *Berlin Mach. Works v. Perry*, 71 Wis. 495; 5 Am. St. Rep. 236, and cases collected in note 240; *Bishop v. Palmer*, 146 Mass. 469; 4 Am. St. Rep. 339, and cases collected in note 343.

WHEN CORPORATIONS MAY BE BOUND TO CARRY OUT CONTRACTS OF ITS MEMBERS. — The general rule undoubtedly obtains at law that corporations cannot be bound by acts done or promises made in their behalf before they come into existence. Until organized, a corporation has no being, franchisees, or faculties. Its promoters, or those engaged in bringing it into being, are in no sense identical with the corporation, nor do they represent it in any relation of agency, and they have no authority to enter into preliminary contracts binding the corporation, unless so authorized by the charter: *Franklin Fire Ins. Co. v. Hart*, 31 Md. 59; *Safety Deposit Life Ins. Co. v. Smith*, 65 Ill. 309; *Gent v. Manuf. etc. Ins. Co.*, 107 Id. 652; *Battelle v. Northwestern Cement etc. Co.*, 37 Minn. 89; *Munson v. Syracuse etc. R. R. Co.*, 103 N. Y. 56; *Frost*

v. Inhabitants of Belmont, 6 Allen, 152; *Payne v. New South*
10 Ex. 253; *Tison v. Warwick Gaslight Co.*, 4 Barn. & C. 962.
 early enough for corporate bodies to enter into contracts wh
 organized according to their charters, and have selected offic
 conduct their business: *New York etc. R. R. Co. v. Ketchu*
 And it is thought more reasonable to hold any services perfor
 incurred prior to organization to have been gratuitous, in vie
 good or private benefit expected to result from the object of
Rockford etc. R. R. Co. v. Sage, 65 Ill. 328; 16 Am. Rep. 5
mont etc. R. R. Co., 28 Vt. 401; *Marchand v. Loan and Ple*
Ann. 289. Accordingly, where the incorporators, before th
 the company was completed, employed a superintendent,
 upon the duties of the position and rendered services for the in
 it is held that the company, when organized, was not liabl
 services: *Western Screw and Mfg. Co. v. Cousley*, 72 Ill. 581;
72 Id. 307; *Deposit Life Ins. Co. v. Smith*, 65 Id. 304
 but with individuals, that when they become incorporate
 other contracting party a certain amount of the paid-up
 corporation, is not a dealing with the corporation itself, nor
 corporation, when organized, but is necessarily a personal co
60 Mich. 26; *Morrison v. Gold Mountain G. M.*
ine v. Mansfield G. M. Co., 52 Id. 513. And where the
 purport to issue and sign a note on behalf of the c
 organization, it will bind them personally, and not the c
55 Mo. 310. And the rule that a corporation
 engagements of its promoters, assuming to contract for
 able, though the promoters become, at the creation of
 stockholders, directors, and officers: *Battelle v. No*
37 Minn. 89.
 while a corporation is not bound by engagements m
 promoters before its organization, yet, after it com
 promoters before its organization, yet, after it com
 operation, it may, by adopting the engagements thus
 make them its contracts, precisely as it might make
 previous engagements been entered into. Such
 if within the corporate powers, and not otherwise ob
 become the contracts of the corporation, an
Belle v. Northwestern Cement etc. Co., 37 Minn. 89;
R. R. Co., 103 N. Y. 58, 76; *Penn Match Co. v. Ho*
ler v. Paris Skating Rink Co., L. R. 7 Ch. Div. 368.
 such adoption be express. It may be shown from
 of the corporation or its authorized agents, as any
 shown: *Battelle v. Northwestern Cement etc. Co.*, 37
 tion subsequently recognizes and treats such contr
 it, in all respects, what it would have been if the r
 had existed when it was entered into: *Frankfort*
427; 17 Am. Dec. 159; *Whitney v. Wyman*, 10
 Id., however, that a corporation cannot ratify a
 before it came into existence; and that what is cal
 such a contract is not the ratification or adopt
 but the creation of an equitable liability dep
 da: *In re Engineering Co.*, L. R. 16 Ch. Div. 125;
R. 9 Com. P. 503; *Kelner v. Barker*, L. R. 2 Con
 Appod, Sup. Jud. Ct., Mass., 1890. That is, a

become bound to fulfill a contract made in its name and behalf, in anticipation of its existence, by afterwards accepting the benefits of the contract, it being inequitable for one not to pay for services of which the benefit has been taken. Thus if the formation of a corporation is in contemplation, and the promoters are taking initiatory steps to perfect its organization and obtain a charter, and they provide in advance the means necessary for its successful operation, all contracts made by such promoters for the benefit of the future corporation, and which were reasonable and proper to put it in operation, and the benefits of which were afterwards accepted by the corporation become binding on it without any formal contract to pay. The corporation must take the burden with the benefits: *Edwards v. Grand Junction R'y Co.* 1 Mylne & C. 650; *Webb v. Direct London etc. R'y Co.*, 9 Hare, 129; *Stanley v. Birkenhead R'y Co.*, 9 Sim. 284; *Preston v. Liverpool etc. R'y Co.*, 7 Eng. L. & Eq. 124; *Petre v. Eastern Counties R'y Co.*, 1 Eng. R'y Cas. 462; and see *Little Rock etc. R. R. Co. v. Perry*, 37 Ark. 164, 187 et seq., where the doctrine is stated at length upon a review of the English decisions. This doctrine of the English courts has been recognized, to some extent, in this country; and it was held, in *Low v. Railroad Co.*, 45 N. H. 375, that a corporation is liable at law, upon an implied *assumpsit*, for services rendered before it came into existence, but which were necessary to perfect its organization, and which, after such organization was perfected, it accepted, and the benefits of which it enjoyed: See also same case affirmed, 46 Id. 284; *Hall v. Vermont etc. R. R. Co.*, 28 Vt. 401. But the Illinois decisions, while admitting the right of a party to recover for services and expenses before the organization of the company, which, subsequently, the company accepts and receives the benefits of, and expressly promises to pay for, are disposed to deny the right of recovery for such services and expenses upon any implied promise resulting from the fact: *Rockford etc. R. R. Co. v. Sage*, 65 Ill. 328; 16 Am. Rep. 587; and see *Gent v. Manufacturers' etc. Ins. Co.*, 107 Ill. 652.

The principle established by the English decisions is recognized by the supreme court of Pennsylvania in the following language: "It may very well be that where a number of persons not incorporated are yet informally associated together in the pursuit of a common object, and with the intent to procure a charter in furtherance of their design, they may authorize certain acts to be done by one or more of their number, with an understanding that compensation shall be made therefor by the company when fully formed; and if such acts are necessary to the organization and its objects, and are subsequently accepted by the company, and the benefits thereof enjoyed by them, they must take such benefits *cum onere*, and make compensation therefor": *Bell's Gap R. R. Co. v. Christy*, 79 Pa. St. 507; 21 Am. Rep. 35, 41. But it was held in this case that the plaintiff could not recover for his services in procuring the charter, making surveys, etc., for the reason that such services were procured and acquiesced in by less than a majority of the active promoters of the scheme. And the rule, that no promise to pay will be implied from the fact that such services were rendered at the request of any number of the corporators less than a majority, is also held in *Low v. Railroad Co.*, 45 N. H. 375. In a Nebraska case, the Paxton Cattle Company was sued as a corporation, seeking to hold it responsible for corporate acts antedating its legal existence. In other words, it was sought to make it pay for property of which the corporation found itself in possession upon coming into legal existence, and that at a price and upon terms in the agreeing upon and fixing which it had not, nor could have had, any legal voice. It was nevertheless held, upon the authority of the last two cases cited above, that, granting the

entire vest of power on the part of the promoters to act at the date of the contract, yet the retaining possession of the consideration by the corporation after its organization amounted to a ratification of the contract, with all of its terms and obligations, and that the corporation was bound: *Paxton Cattle Co. v. First Nat. Bank*, 21 Neb. 521; 59 Am. Rep. 352. So a corporation was held to be estopped from denying its liability for services performed under a contract made with the acting president after the certificate of incorporation was signed by the members, but before it was recorded, as required, to constitute the company a corporation, the benefits of the contract having been accepted by the company after its organization: *Grape Sugar Co. v. Small*, 40 Md. 395; and see *Bonner v. American Spiral Spring etc. Co.*, 81 N. Y. 463; *Metropolitan Tel. Co. v. Domestic Tel. Co.*, 44 N. J. Eq. 568. The rule, that whenever a third party enters into a contract with the promoters of a corporation, which is intended to inure to its benefit, and the corporation takes the benefit of the contract, it will be bound to perform it, is sustained by the supreme court of Arkansas. But in order to recover against a corporation in such case in an action at law, the plaintiff must prove either an express promise of the new company, or that the contract was made with persons then engaged in its formation, and taking preliminary steps thereto, and that the contract was made on behalf of the new company, in the expectation of the plaintiff, and with the assurance of the promoters, that it would become a corporate debt, and that the company afterwards entered upon and enjoyed the benefit of the contract, and by no other title than that derived through it. From these circumstances an affirmance of the contract would be implied: *Little Rock etc. R. R. Co. v. Perry*, 37 Ark. 164; affirmed, 44 Id. 383; but this doctrine can have no application to cases in which private persons, contracting exclusively upon their individual credit, afterwards create a corporation for the more convenient management and enjoyment of the benefits acquired by the contract: Id.

TOMPKINS v. LEVY.

[57 ALABAMA, 269.]

INSURANCE—WHO ENTITLED TO PROCEEDS OF POLICY ON LIFE OF HUSBAND FOR BENEFIT OF WIFE AND CHILDREN.—Under provisions of Alabama code of 1876, sections 2733, 2734, the husband might insure his own life for the benefit of his wife, making the insurance payable to her children in case she died before him, and when so made payable, the proceeds of the policy could not be subjected by the husband's creditors to the payment of his debts. But upon the death of the wife before her husband, her interest in the policy ceased, and the policy being made payable to the wife, "her heirs, executors, or assigns," her children could acquire no interest which would be exempt from the claims of the husband's creditors on his subsequent decease.

INSURANCE—RESERVATION IN LIFE POLICY CONSTRUED AS IN FRAUD OF CREDITORS.—A policy taken out by a husband on his own life, payable to his wife, "her heirs, executors, or assigns," the insured paying the premiums out of his own funds, expressly provided that after the expiration of fifteen years, on surrender of the policy, none of its conditions having been violated, the company would pay to the insured, "his heirs,

executors, or assigns," the equitable value of the policy, "as an endowment in cash." It was held that such reservation for the beneficial use of the insured himself rendered the policy fraudulent as against his creditors.

EQUITY — PARTIES TO BILL. — PERSONAL REPRESENTATIVE OF DECEASED HUSBAND IS NOT NECESSARY PARTY to a bill filed by creditors seeking to subject the proceeds of a policy of insurance on his life, as against the claims of his children to the payment of their debts, although he might be a proper party.

PARTNERSHIP. — SUIT MAY BE MAINTAINED IN NAME OF PARTNERSHIP WHICH HAS BEEN DISSOLVED, it being sufficient to describe it as a late partnership, and setting out the names of the late partners.

BILL filed by M. Levy and Brother, "a late mercantile partnership, which was composed of Maurice Levy and Samuel Levy," as creditors of M. J. Brasfield, deceased, against Margaret J. Tompkins, as the administratrix of his deceased wife, Mrs. Sallie A. Brasfield, and their two infant children. The purpose of the bill, and other material facts, appear in the opinion.

Austill and Ervin, for the appellant.

Greg. L. and H. T. Smith, contra.

SOMERVILLE, J. The purpose of the bill is to subject the proceeds of a policy of insurance on the life of Milton J. Brasfield, deceased, to the payment of certain debts of the decedent. The policy was made payable to his wife, "Sallie A. Brasfield, her heirs, executors, or assigns." The premiums were paid by the assured out of his own funds. He died in the year 1887, having survived his wife about eight years, she having deceased in the year 1879, leaving two minor children. It is claimed that these children are entitled to the fund, under the provisions of sections 2733 and 2734 of the code of 1876, authorizing married women to insure the lives of their husbands free from the claims of creditors, or the claims of the husband's personal representatives. The word "heirs," it is contended, must be construed to mean "children"; and such a construction is asserted to entitle the two children to the fund under the statute.

It is manifest that the fund is liable to the claims of the husband's creditors, unless it is rescued from such liability by the terms of the statute, which we have held to be in the nature of an exemption law, and, for this reason, to be liberally construed to effect the purpose of its enactment: *Fearn v. Ward*, 65 Ala. 33; 80 Id. 555; *Felrath v. Schonfeld*, 76 Id. 199;

52 Am. Rep. 319; *Continental Life Ins. Co. v. Webb*, 54 Ala. 688; *Appeal of Elliott's Ex'rs*, 38 Am. Dec. 525, 531, note.

The statute provides that a policy of insurance taken out under its provisions, on the husband's life, for the benefit of the wife, shall be payable to her, "in case of her surviving her husband": Code 1876, sec. 2733. It is further declared, in the following section, that "in case of the death of the wife before the decease of the husband, the amount of the insurance may be made payable after death to her children, for their use, and to their guardian, if under age": *Id.*, sec. 2734.

The wife here has not survived her husband, and there is no clause in the policy making the amount of the insurance payable to the children in case of her death before his decease. It is too plain to admit of argument that the statute does not, *proprio vigore*, make such policies payable to the children, on the death of the wife before the husband, irrespective of the contract, but it only authorizes such a provision to be incorporated in the contract of insurance, so as to rescue such contract from the taint of fraud, and exempt the proceeds of the policy from liability to creditors or administration.

It is equally obvious that by the terms of the statute the wife's interest is contingent on her surviving her husband, and in event of her death before his, it is gone. The New York statute of 1840, from which our own is substantially copied, has been construed by the court of appeals of that state to be enabling, and not declaratory of the common law. In *Eadie v. Slimmon*, 26 N. Y. 9, 82 Am. Dec. 395, after holding that a policy upon the life of the husband, for the benefit of the wife, could not be assigned so as to destroy the right of the wife,—a point as to which we intimate no opinion,—the following language was used by Denio, C. J.: "By the general rules of law, a policy on the life of one sustaining only a domestic relationship to the insured would become inoperative by the death of such insured in the lifetime of the *cestui que vie*; or if it could be considered as existing for any purpose after that event, it would be for the benefit of the personal representatives of the insured; but by this act, the contract may be continued in favor of the children of the insured wife after her death."

The Connecticut statute is substantially like that of New York and Alabama. In *Connecticut Mut. Life Ins. Co. v. Burroughs*, 34 Conn. 305, 91 Am. Dec. 725, it was said that while the doctrine of *Eadie v. Slimmon*, 26 N. Y. 9, 82 Am. Dec. 395, as to the non-assignability of such policies, seemed reasonable

and just, where the husband paid the premiums, yet where the wife paid them from her own separate estate, it was difficult to suggest a reason why she should not have the same power to assign her interest in the policy that she has to assign any other chose in action belonging to her. Nevertheless, it was decided, where she attempted to make such assignment, her interest being contingent on her surviving her husband, and she having died before he did, her interest terminated, and her assignee acquired nothing under the assignment. To the same purport is the reasoning upon which the decision of this court rests in *Continental Life Ins. Co. v. Webb*, 54 Ala. 688; see also May on Insurance, 2d ed., sec. 391; and *Appeal of Elliott's Ex'rs*, 88 Am. Dec. 532, note.

We hold that upon the death of Mrs. Brasfield her interest in the policy of insurance on her husband's life ceased.

Was it continued, by the terms of the statute, for the benefit of her children? Under the most liberal construction of the statute which we feel authorized to give it, we cannot hold that it was. It could lawfully have been made payable to the children upon the death of the wife, but it is sufficient to say that it was not so made. The word "heirs," as used in the policy, must, under all the authorities, be construed with reference to the species of property which is the subject of disposition, whether real or personal; and when used with reference to personal property, it must be held to mean distributees, or next of kin. This is especially so, when associated with the words "executors" and "assigns": *Scudder v. Van Arsdale*, 13 N. J. Eq. 109; *Hodges's Appeal*, 9 Ins. L. J. 709 (Pa.); *Kaiser v. Kaiser*, 13 Daly, 522; *Cushman v. Horton*, 1 Hun, 601; *Gauch v. St. Louis Mut. Life Ins. Co.*, 88 Ill. 251; 30 Am. Rep. 554. And while it is true that the children might be distributees of their mother's estate, they could only be so in the event that her interest in the fund did not terminate on her death. But having terminated, it could not pass to her estate, or distributees, in the order of usual succession. The interest of the distributees, being derived through her, was also contingent on the wife's surviving the husband, which, as we have seen, never happened: *Fuller v. Linzee*, 135 Mass. 468.

We might or might not construe the statute in like manner, if the premiums on the policy had been paid with funds belonging to the wife's separate estate. But in this case they were paid with the husband's funds, and we confine the construction to the case before us. The phraseology of the new

code, it will be noticed, has been materially changed in several particulars touching this matter: Code 1886, sec. 2356.

There is another feature about this policy which stamps it as fraudulent against creditors, and takes it out of the protection of the statute. It is the interest which Milton Brasfield reserved to himself in the event of his surviving for fifteen years after its issue. It is expressly provided that after the expiration of this number of years, on surrender of the policy, none of its conditions having been violated, the company would pay to Brasfield himself, "his heirs, executors, or assigns," the equitable value of the policy, "as an endowment in cash." It is obvious that the interest of Mrs. Brasfield in this policy was contingent upon her husband's dying before the expiration of fifteen years from date, and had he survived for this length of time, the cash value of the policy could have been claimed by him, free from any trust in favor of the wife: *Levy v. Van Hagen*, 69 Ala. 17. That a reservation of this kind would be such a locking up of the debtor's property from creditors, for his own beneficial use, as to evince an intent to hinder, delay, or defraud creditors, has never been doubted since the doctrine settled in *Twyne's Case*, decided near three centuries ago: *Benedict v. Renfro*, 75 Id. 121; 51 Am. Rep. 429; *Murray v. McNealy*, 86 Ala. 234; 11 Am. St. Rep. 33; *Woodall v. Kelly*, 85 Ala. 368; 7 Am. St. Rep. 57.

The personal representative was not a necessary, although he may have been a proper, party defendant to the bill: *Coffey v. Norwood*, 81 Ala. 512.

There is nothing in the suggestion that the bill was improperly filed in the name of the partnership which had been dissolved. It is described as a late partnership, and the names of the individual members of the firm are set out. This was clearly sufficient.

The second ground of demurrer suggests the point that the premiums paid by Milton Brasfield to keep the policy in force were paid with the knowledge and assent of complainants, and such payment was not therefore a fraud on them. The allegations of the seventh paragraph of the bill, bearing on this point, refer for explanation to those set out in the tenth paragraph; and the latter having been stricken out by amendment, the remaining averments are not sufficiently clear and specific to raise the question. We do not therefore consider it. It can be raised by plea or answer to the bill.

The extent to which the proceeds of the policy in question are liable to the demand of the complainants is not raised by the demurrer. If any portion of the fund is liable, as we have held it is, the demurrer raising this question was properly overruled.

The decree of the chancellor so ruling is affirmed.

INSURANCE, LIFE. — AS TO THE RESULTS consequent upon the death of a beneficiary before the death of a person whose life is insured, see extended note to *Hooker v. Sugg*, 11 Am. St. Rep. 721-724; compare *Brown's Appeal*, 125 Pa. St. 303; 11 Am. St. Rep. 900; *Martin v. Stubbings*, 126 Ill. 387; 9 Am. St. Rep. 620, and note 629, 630. Where a husband insures his life for the benefit of his wife and children, and the wife dies intestate, before her husband, leaving children, her interest, after payment of her debts, goes to the husband, and at his death to his personal representative: *Simmons v. Biggs*, 99 N. C. 236.

INSURANCE, LIFE. — Assignment of policies of life insurance by an insolvent debtor, in trust for the benefit of his wife, is fraudulent and void as against his creditors: *Appeal of Elliott's Ex'rs*, 50 Pa. St. 75; 88 Am. Dec. 525, and extended note 530-533, as to life insurance in fraud of creditors.

INSURANCE COMPANIES v. RADEN.

[87 ALABAMA, 511.]

INSURANCE. — AGENCY TO PROCURE INSURANCE IS ENDED when the policy is procured and delivered to the principal, and the agent has no power, after the policy is so delivered, to consent to a cancellation, or to accept notice of an intended cancellation by the insurer.

INSURANCE. — DUAL AGENCY — NOTICE OF CANCELLATION OF POLICY. — Provision in policy of insurance authorizing the company at any time to terminate the insurance, on notice to that effect to the insured, "or to the person who may have procured the insurance to be taken," is not susceptible of being construed as applicable to a case where the same person acted as agent for both parties in procuring and issuing the policy, and notice was not given to the insured in person.

INSURANCE. — RATIFICATION OF CANCELLATION OF POLICY BY INSURED WILL NOT BE PRESUMED from his acceptance, after a loss of a policy procured by the same agent in another company, when it is not shown that all the facts bearing on the case were disclosed to the insured, and that he was fully informed of his legal rights as governed by them; nor will such ratification be presumed from the institution of a suit on the substituted policy, induced by the agent's misrepresentations to the attorneys of the insured.

Hewitt, Walker, and Porter, for the appellants.

Webb and Tillman, and McIntosh and Altman, contra.

SOMERVILLE, J. The bill is filed by the appellee, Mrs. Raden, to restore or reinstate two policies of fire insurance,

alleged to have been canceled by fraud or mistake of fact, and to re-establish these instruments as evidences of the liability of the defendant companies by which they were issued, and to incidentally enforce them by the rendition of moneyed decrees for the amount of the loss by fire, not exceeding the amount of the policies, which were each for the sum of \$1,250. The court below granted the full relief prayed in the bill, holding both of the policies to be of binding force.

A demurrer was filed to the bill, but no assignment of error is based on the action of the court in overruling it. Objection to this ruling is expressly waived, and the only question presented by the record is, whether the insurers, — the Niagara Fire Insurance Company, and the Hamburg-Bremen Insurance Company, — one or both, are liable on these policies, under the facts disclosed by the evidence.

The complainant's property in Bessemer is shown to have been destroyed by fire on the night of July 19, 1887; and no controversy is raised as to its value, or the amount of the loss. The property was originally insured in the Liverpool, London, and Globe Insurance Company, on July 2, 1887, for two thousand five hundred dollars; but this policy was canceled, and the two policies here in controversy were substituted in its place, by consent of the insured, a week or ten days after this cancellation.

The defense to the present suit is, that each of the policies in controversy was canceled on July 18, 1887, — the day before the occurrence of the loss. This is alleged to have been effected by giving notice of such cancellation to one Langley, who is claimed to have been the agent of Mrs. Raden, the insured, and to him was paid the return premium. It is not denied that cancellation was effected, if Langley was the agent of the insured for the purpose of receiving the notice and the return premium. The whole question of cancellation hinges on this one fact.

One John G. Smith was the agent of the defendant companies at Birmingham, Alabama. He was also agent for the Liverpool, London, and Globe Insurance Company, in which the first policy was obtained. Flanagan and Langley were insurance agents at Bessemer, Alabama, their exact relations towards Smith not being made very clear by the testimony. The testimony is very conflicting on the point as to whether they acted as agents of Smith, or of Mrs. Raden, or merely as insurance brokers, in procuring the first policy, as to the can-

cellation of which no controversy exists. Flanagan says they acted for Smith, and Smith asserts they acted for Mrs. Raden. This Mrs. Raden denies. Langley says they acted as insurance brokers, dividing commissions with Smith. It is quite clear to us that Langley, as he himself testifies, solicited the insurance of Mrs. Raden; that she was induced to make a written application for the first policy, and that it was countersigned by Flanagan and Langley, as agents of the Liverpool, London, and Globe company, and was transmitted by them to Smith, at Birmingham. This document appears in the record as an exhibit to Langley's deposition, and is more trustworthy than the less certain memory of witnesses.

All of this testimony relates, as we have said, to the first policy, admitted to be canceled. We do not deem it necessary to discuss this part of the evidence at length, as it does not seem to be of controlling importance. The question is, Who procured the issue of the policies here in controversy? Did Langley, or his firm, do so as the agents of Mrs. Raden? If not, the notice to Langley, and the payment of the return premium to him, did not operate to cancel these policies, or rescind the contract of insurance evidenced by them.

We are satisfied from the testimony that Smith, and not Langley, procured these policies to be issued. There is scarcely enough conflict in the evidence to raise any serious controversy on this point. Smith was himself the authorized agent of these defendant companies at Birmingham. Flanagan and Langley had no connection with them. When ordered to cancel the Liverpool, London, and Globe policy, he at once volunteered to substitute for the canceled policy the two policies in controversy, which he transmitted to Mrs. Raden through Flanagan and Langley for delivery; and this seems to be all the latter firm had to do with the matter. Smith, it is true, insists on the fact of this firm's agency for the insured, and testifies that they were her agents; but the facts stated by him refute the existence of the alleged agency. He says: "After the cancellation [of the Liverpool, London, and Globe policy], Mrs. Raden's property was insured in other companies by me, and the policy in the Liverpool, London, and Globe was surrendered by me to Flanagan and Langley. In order to secure her from loss, I insured her property in other companies." And again, on cross-examination: "When the Liverpool, London, and Globe Insurance Company policy was canceled, I issued the policies in the defendant companies

without the knowledge of Mrs. Raden, or her agents, Flanagan and Langley."

As to the policy of one of the defendants—the Hamburg-Bremen Insurance Company—we need say but little. Even if it were admitted that Langley had procured this policy to be issued, or if it be assumed that Smith did so, the agency ceased when the policy was delivered to the insured. We have decided at the present term that "an agency to procure insurance is ended when the policy is procured, and the policy delivered to the principal; and the agent employed to procure the insurance has no power, after the policy is so delivered, to consent to cancellation": *Insurance Company of North America v. Forchheimer & Co.*, 86 Ala. 541. This doctrine is fully supported by the adjudged cases: *Herman v. Niagara Fire Ins. Co.*, 100 N. Y. 411; 53 Am. Rep. 197; 1 Wood on Fire Insurance, 2d ed., 337, sec. 142. Notice of cancellation to Langley, therefore, with his consent to rescission, was no notice to or consent by Mrs. Raden: *Grace v. American Cent. Ins. Co.*, 109 U. S. 278; May on Insurance, 2d ed., sec. 138.

As to the policy of the other defendant—the Niagara Fire Insurance Company—a slightly different view must be taken, because of the following provision relating to the cancellation of policies: "This insurance may be terminated at any time by request of the assured, or by the company on giving notice to that effect to the assured, or to the person who may have procured this insurance to be taken. On surrender of the policy, the company shall refund any premium that may have been paid, reserving the usual short rates in the first case, and *pro rata* rates in the other case."

This policy, as we have shown, was obtained for Mrs. Raden by Smith, not by Langley. Smith was the person who procured it to be taken, within the meaning of the policy. Now, Smith was the agent of the company to issue the policy. He therefore occupied an ambiguous attitude, or a double agency, involving conflicting rights and duties. The provision above cited was not intended to cover a case of this character. It could not have been contemplated that the agent of the company should give notice to himself, as agent also of the insured, of the cancellation, or rescission of the contract of insurance, nor that he should pay to himself the return premium required to be paid under the terms of the contract, without which payment there could be no cancellation. If susceptible of this construction, the provision would be invalid as in violation of

all sound principles of public policy, and we would so declare it. The law will not permit an agent thus to serve two masters with conflicting interests: *Commercial Fire Ins. Co. v. Allen*, 80 Ala. 571, and cases cited 576; *Piedmont & A. Ins. Co. v. Young*, 58 Id. 476; 29 Am. Rep. 770; 2 Wood on Fire Insurance, 2d ed., 833 et seq., sec. 409; *Kausal v. Minnesota etc. Ass'n*, 31 Minn. 17; 47 Am. Rep. 776.

Under these principles, Mrs. Raden had no notice of the cancellation until the loss by fire had occurred, and the liability for such loss had been fastened on the insurers. Nor was the return premium paid back to her before such loss, the payment to Langley being no payment to her.

We come next to the question of ratification. It is contended that Mrs. Raden ratified the alleged cancellation in two ways: 1. By accepting two other policies of insurance,—one in the Mobile Fire Insurance Company, and the other in the St. Paul Fire and Marine Insurance Company,—which were substituted by Smith for the policies in controversy, covering the same property, and for like amounts; and 2. By having brought suit on these substituted policies before filing the present bill. And it is said that all this was done by Mrs. Raden with a full knowledge of the facts of the case on her part.

These policies were not delivered to Mrs. Raden until after her property was destroyed by fire, and her right to indemnity for the loss had accrued, although they had been taken out by Smith, without her knowledge, before the fire. Smith, again, in this matter, acted as agent for Mrs. Raden. He was an insurance agent, shown to be intelligent, and presumably an expert, in matters pertaining to this subject. She was a foreigner by birth, and evidently ignorant as to her legal rights, unless fully instructed as to them. Under this state of facts, Smith owed her peculiar duties before she can be declared by a court of equity to have voluntarily abandoned her claim under these policies against the defendants. He should not only have disclosed to her all the facts bearing on the case known to him, but it should be shown to the court that she knew the transaction to be impeachable,—that is, that she knew she had a legal right to refuse to accept the new policies, and to claim indemnity under those in controversy: *Voltz v. Voltz*, 75 Ala. 567. The inference is fair that Smith was aware of the fact that Mrs. Raden had a valid claim against the defendant companies, and it is clear that she

was ignorant of this legal right. This misapprehension he should have rectified, and his failure to do so is a sufficient ground for equitable relief: 2 Pomeroy's Eq. Jur., sec. 847.

It is not shown, moreover, that Mrs. Raden knew, at the time of her alleged ratification, that Smith had procured the new policies upon the representation that no other insurance existed on the property,—based, no doubt, on the idea that the policies in the defendant companies had been canceled, which, as we have seen, was not true. Whether this would or would not vitiate the new policies in the Mobile and St. Paul companies, we do not decide. We say only that the fact in question was one material in its bearings, and that a ratification made in ignorance of it cannot be held to be binding.

The suits at law brought on these policies by Mrs. Raden's attorneys are clearly shown to have been instituted under a mistake of fact. Smith led these attorneys to believe that Langley was the agent of their client, and that the notice of cancellation given, and the return premium paid to him, effected a rescission of the policies in the defendant companies,—the Niagara Fire and the Hamburg-Bremen insurance companies. These suits cannot, for this reason, operate as a ratification by Mrs. Raden of the acceptance of the new policies, and as an intentional abandonment of her vested rights under the policies in existence when the loss occurred.

Our judgment is, that the chancellor did not err in holding the policies here in controversy to be binding on the insurers, and that his decree granting the relief prayed is free from error, and must be affirmed.

INSURANCE AGENTS. — An agent cannot cancel a policy without the knowledge and consent of the assured; and a cancellation agreed upon between the agent and the company cannot affect assured's rights under the policy: *Insurance Co. of North America v. Forcheimer*, 86 Ala. 541.

INSURANCE. — Notice by an insurer of intention to cancel a policy cannot be given to nor served upon the agent by whom the policy was obtained, even though the policy declares that the person who procured it should be deemed the agent of the insured: *Mutual Assur. Co. v. Scottish etc. Ins. Co.*, 84 Va. 116; 10 Am. St. Rep. 819, and note 826.

INSURANCE AGENTS. — An insurance broker is the agent of the company for the purpose of delivering the policy and collecting the premium: *Duluth Nat. Bank v. Knoxville F. Ins. Co.*, 85 Tenn. 76; 4 Am. St. Rep. 744, and note 751. An agent of a mutual insurance company filling up an application is the agent of the company, notwithstanding a stipulation to the contrary in the policy: *Kausal v. Minnesota etc. F. Ins. Co.*, 31 Minn. 17; 47 Am. Rep. 776, and note.

TILLMAN v. THOMAS.

[87 ALABAMA, 321.]

EQUITY — DEMURRER TO BILL FILED IN DOUBLE ASPECT. — Objection to a bill filed in a double aspect to set aside a sale of lands under a probate decree, upon the ground, — 1. Of fraud; or 2. That the proceedings are void on their face, — can only be taken by demurrer specially assigned.

EQUITY — ADEQUATE REMEDY AT LAW — DEMURRER. — A general demurrer to a bill in equity, on the ground that the bill discloses an adequate remedy at law, is properly overruled where the remedy at law is adequate to one only of the two aspects in which relief is prayed.

EQUITY — JURISDICTION TO SET ASIDE SALE PROCURED BY FRAUD — WHEN SUBPURCHASER IS NOT ENTITLED TO PROTECTION. — A sale of lands under a probate decree, procured to be made through fraudulent collusion between the administratrix of the deceased owner and the purchaser, in payment of her individual indebtedness to him, will be set aside in equity at the suit of the heirs, on averment and proof of such facts; and a subpurchaser from the original fraudulent purchaser, having a sufficient knowledge of the facts to put him on inquiry, is chargeable with notice of the fraud, and is not entitled to protection as against the equity of the heirs.

BILL in equity filed by the heirs at law of John R. Thomas, deceased, against W. L. Tillman, B. R. Burts, Mrs. Rebecca P. Kennedy, and others, seeking to set aside a sale of certain lands owned by the decedent in his lifetime. Letters of administration on the estate of the decedent were granted to his widow, Mrs. Rebecca P., who afterwards married W. L. Kennedy, and the lands in question were sold under a probate decree on her petition as administratrix. The said Tillman became the purchaser at the sale, and afterwards sold and conveyed a part of the land to Burts. The complainants sought to set aside the sale, on the ground that it was procured by fraudulent collusion between Mrs. Kennedy and her husband, and said Tillman, to whom they were indebted, and on the further ground that the proceedings were void on their face. Tillman and Burts each demurred to the bill, on the ground that the complainants had an adequate remedy at law; and Burts also claimed protection as a purchaser for valuable consideration without notice. A decree was rendered for the complainants as prayed, and Tillman and Burts appealed.

Watts and Son, and J. B. Mitchell, for the appellants.

Hooper and Waddell, contra.

MCCLELLAN, J. This is a bill by heirs, seeking to set aside and vacate the proceedings of the probate court, under which lands belonging to the estate of their ancestor were sold by his

personal representative. As amended, the bill is presented in two aspects. In one, it is sought to vacate the order of sale and confirmation, on the ground of fraud in their rendition. In the other, the same result is attempted to be reached, on the ground that the probate proceedings are void on their face. A cause, if proper objection be interposed, cannot thus be presented to a court of equity in a double aspect, unless the complainant is entitled to the same relief on each phase of his allegations. That is not true in the case at bar. On the contrary, in that aspect in which the ground of relief is fraud, he would, if the averments are supported by the evidence, be entitled to a decree vacating the order of sale, and annulling all proceedings thereunder; while in that aspect in which the decree is alleged to be void on its face, he would be entitled to no relief in equity, but would be remitted to the law courts: *Florence v. Paschal*, 50 Ala. 28; *Tyson v. Brown*, 64 Id. 244. If the latter allegation be not treated as merely redundant, it would seem that the bill presented two claims for relief which ought not to have been joined. But the objection on that ground could only be taken by demurrer, and no demurrer going to this point was interposed: *Seale v. Robinson*, 75 Id. 263.

There was a general demurrer to the bill, as amended, on the ground that it disclosed that complainants had an adequate remedy at law. This objection was well taken to only one of the two aspects in which relief was prayed. Under the allegations that the proceedings sought to be vacated were void on their face, it was disclosed that an adequate remedy at law existed. But the complainants had no such remedy under their claim for relief on the ground of fraud. The rule is of general application, that where the bill sets forth two or more claims for relief in equity, and a general demurrer is filed by respondents, it should be overruled, and the relief granted, if any of the grounds upon which relief is sought are of equitable cognizance: 1 *Daniell's Chancery Pleading and Practice*, 550; *Dimmock v. Bixby*, 20 Pick. 374; *Morton v. Granada Academy*, 8 Smodes & M. 773. In Alabama, this principle has been applied to a case very like the present one. A bill was filed to have a deed canceled as a cloud on title. The allegations disclosed one state of facts on which the remedy was in chancery, and another on which the remedy was at law. There was a demurrer to the whole bill, on the ground that the complainant had an adequate legal remedy. The opinion of this

court was that "the bill contains two distinct, independent grounds on which the claim for relief is based, and that if either ground is sufficient, its force is not impaired by the fact that it is joined cumulatively with another alleged ground which, of itself, will not maintain the equity of the bill," and it was accordingly held that the demurrer was properly overruled: *Shipman v. Furniss*, 69 Ala. 563; 44 Am. Rep. 528.

We concur with the chancellor's finding on the evidence that the order of the probate court for the sale of the lands described in the bill, and all the proceedings in that behalf, were procured to be made, had, and done, by and through the fraudulent collusion of the defendants (appellants here), Tillman, W. L. Kennedy, and Rebecca P. Kennedy, the latter being the administratrix of the estate. We are satisfied, also, that the purchase-money of the land was never intended to be paid, and was not in fact paid, and that neither the estate nor the complainants ever received any benefit from the sale of said lands. On these facts there can be no doubt of the power of the chancery court to declare the orders of sale and confirmation void, and make all other decrees necessary to a complete rehabilitation of the title of the heirs, and to a full redress of the injuries they have suffered through the wrongful disseisin of their lands. It is one of the honorable boasts of our system of equity jurisprudence that "the infection of fraud will be made to vitiate even the most solemn transactions, and adjudications of courts form no exception to the salutary rule": *Freeman on Judgments*, sec. 449; *Eslava v. Eslava*, 50 Ala. 32; *Lee v. Lee*, 55 Id. 590; *Humphreys v. Burleson*, 72 Id. 1; *Dunklin v. Wilson*, 64 Id. 162.

We also concur with the chancellor that the evidence sufficiently shows the *mala fides* of the respondent Burt in his purchase of the lands from Tillman. It is in proof that he knew the lands belonged to the estate of Thomas, and so were being sold in a fiduciary capacity by Mrs. Kennedy. He admits that the uncle of the minor heirs, who was also a surety on the administration bond, had told him that whoever bought this land would buy a lawsuit. He swears that he had reason to believe that Tillman bought the land in satisfaction of a mortgage he held on Kennedy and wife, and that he knew Tillman had furnished them supplies, and that Kennedy told him that the land was to be sold to reimburse him, Kennedy, moneys he had paid out for the estate. While it may be that no one of these facts would have been sufficient to put him on

inquiry, yet all of them combined are adequate to that end. Holding him, as all men must be held, to know the law, he had notice that a trust estate was being sold to pay the individual indebtedness of the agent of the trustee to his vendor, and that objection was being made to this transaction by a near relative of the infant *cestuis que trust*, and in their behalf. This should have put him on inquiry: *Pendleton v. Fay*, 2 Paige, 202; *Stanghill v. Austey*, 1 DeGex, M. & G. 635.

Had the inquiry been prosecuted, the legal presumption is, that the real facts would have been ascertained. Had he gone, for instance, to Mrs. Kennedy, who was the trustee thus converting the trust estate, the law presumes that she would have told him the whole truth, as she seems to have done in this case, and he would have been fully apprised of the infirmity of his vendor's title; and had he gone to the records of the probate court, which contained the evidence of one link in the title he was about to buy, he would have found, indeed, that the proceedings were not void on their face; but at the same time, and as a part of the same record, he would have found the most solemn asseverations, on the part of the heirs and the sureties of the administratrix, of fraud and crime in the administration of the trust property. Equity will hold him to a knowledge of all the facts that these inquiries would have disclosed to him; to a knowledge in this case of no more or no less than that the title of his vendor was the issue of fraud and collusion, and was void.

The decree of the chancellor is therefore affirmed.

EQUITY — DEMURRERS. — The equity of a bill in chancery can be questioned only by demurrer, or on the hearing: *Brill v. Stiles*, 35 Ill. 305; 85 Am. Dec. 364. Under chancery practice, a defendant may plead or demur to the whole bill, or to a part of it, and he may demur to a part, plead to a part, and answer to the residue; but he cannot plead or answer and also demur to the whole bill or to the same part of it: *Appeal of Barbey*, 119 Pa. St. 412.

ADMINISTRATOR'S SALE. — Collusion between the administrator and purchaser renders the sale void: *Swink v. Snodgrass*, 17 Ala. 653; 52 Am. Dec. 190; *Pearson v. Moreland*, 7 Smedes & M. 609; 45 Am. Dec. 319.

EQUITY — JURISDICTION. — Jurisdiction in equity depends, not so much on the want of a common-law remedy, as upon its inadequacy: *Earley's Appeal*, 121 Pa. St. 496. The most familiar subjects of equitable jurisdiction are, accidents, mistake, accounts, trusts, fraud, want of remedy at law, and many more, as well as all statutory equitable jurisdiction: *Neff v. Baker*, 82 Pa. 401; *Moore v. Lipcombe*, 82 Id. 546.

FRAUD which will convert a purchaser at a judicial sale into a trustee *ex officio* must be fraud existing at the time of sale by which title was pro-

cured: *Kraft v. Smith*, 117 Pa. St. 183; and note to *Saltbury v. Black*, 4 Am. St. Rep. 624.

EXECUTORS AND ADMINISTRATORS — SALE. — An agreement entered into to prevent competition at an administrator's sale is unlawful and void: *Goldman v. Oppenheim*, 118 Ind. 96. An administrator is guilty of fraud when he purchases at his own sale, even through the agency of another, and under a license from court, when he pays less than the actual value for the property, and immediately resells for a much greater sum: *Grant v. Hughes*, 99 N. C. 375; compare *Grant v. Hughes*, 96 Id. 177; compare also *Brown v. Brown*, 64 Mich. 75, and *Sanders v. Sorrell*, 65 Miss. 283, for instances of fraud and alleged fraud on the part of administrators in making sales; compare *Barton v. Benson*, 126 Pa. St. 431; 12 Am. St. Rep. 883, and note 885.

ADMINISTRATION — INTERFERENCE OF EQUITY. — Equity can interfere in the administration of an estate only under certain circumstances; and when the special matter for which the court of chancery was invoked has been disposed of, equitable jurisdiction ceases: *Hawkins v. Layne*, 48 Ark. 544.

ANDERSON v. BELLENGER.

[37 ALABAMA, 234.]

SURETYSHIP. — CONTRACT OF SURETYSHIP IS CONSTRUED STRICTLY in favor of the surety. He has a right to stand upon the very terms of his contract; and any alteration therein made without his consent is fatal to his obligation, whether he is injured thereby or not, and although it may appear to be to his advantage. But alterations which operate to discharge the surety must be such as are material, and alterations in the writing made by a third person are, in legal contemplation, wholly immaterial, and do not change the legal import of the instrument, nor discharge the surety.

SURETYSHIP — WHEN SURETY IS NOT DISCHARGED BY INSERTION OF NAME OF ADDITIONAL CO-OBLIGOR. — A statutory claim bond, having been signed by two sureties and their principal, was delivered to and accepted and approved by the sheriff, who then procured and accepted the additional signature of a third person as surety. In such case the act of the sheriff in inducing and accepting the signature, and the act of the third person in signing, are to be regarded as the unauthorized acts of strangers to the contract, and the liability of the original sureties is not affected thereby.

SUNDAY — INVALIDITY OF SUNDAY CONTRACT. — A statutory claim bond delivered to and accepted by the sheriff on Sunday is absolutely void under section 1749 of the Alabama code, which declares void all contracts made on Sunday; and when the plaintiffs in the action bring suit on the bond, a plea averring its invalidity because of its acceptance on Sunday need not aver also the complicity of the plaintiffs in such acceptance.

BONDS — DEFENSE BY SURETY TO ACTION ON. — In an action on a statutory claim bond, a plea by one of the sureties averring that he was fraudulently induced by the sheriff to sign the bond, under a mistake of fact, after it had been accepted and approved by the sheriff with the signatures of the other two sureties only, is good.

ACTION by Bellenger and Ralls, a partnership, against James Lancaster, T. M. Anderson, F. M. Reeves, and W. L. Aycock, founded on a statutory claim bond, in which said Lancaster was principal, and the other defendants were sureties. The plaintiffs had brought detinue against one G. W. Lancaster, and the property being seized by the sheriff, a statutory claim to it was interposed by the said James Lancaster, and the bond in suit was given as required by statute. The plaintiffs recovered judgment in the detinue suit, and the claimant therein having failed to produce the property in accordance with the condition of the bond, this suit was brought thereon. The suit was discontinued as to James Lancaster, and prosecuted to judgment against the other defendants. Issue was joined on the plea of "the general issue," in which the defendants joined. Anderson and Reeves also filed a special plea of *non est factum*, alleging that after they had signed the bond with Lancaster, and after its approval and acceptance by the sheriff, and without their consent or that of their principal, the said sheriff procured and obtained the signature of said Aycock to said bond; and they filed a further plea, alleging that said bond was delivered to the said sheriff and by him approved on Sunday. Said Aycock also filed a special plea, alleging that he was induced by the fraud and misrepresentations of the sheriff to sign the bond as surety after it had been approved and accepted with the signatures of the other two sureties only. The court sustained a demurrer to each of these special pleas, and its judgment is assigned as error.

W. L. Whitlock, J. H. Disque, and George D. Motley, for the appellant.

Dortch and Martin, contra.

McCLELLAN, J. The contract of suretyship must be strictly construed in favor of the surety. His obligation is voluntary, without any consideration moving to him, without benefit to him, entered into for the accommodation of his principal, and generally, also, for that of the obligee; and courts see to it that his liabilities thus incurred are not enlarged beyond the strict letter of his undertaking. To the extent, and in the manner, and under the circumstances pointed out in his obligation, he is bound, and no further. His contract cannot be changed in any respect. Whether an alteration is or is not to his benefit, is not open to inquiry. "He has a right to stand upon the

very terms of his contract"; and if a variation is made which extends its liability "to another person, or to any other subject, or for any other period of time than such as may be included in its words," and he does not assent to it, such variation is fatal to his obligation, whether he is injured thereby or not: *Miller v. Stewart*, 9 Wheat. 681; *Taylor v. Johnson*, 17 Ga. 521; *Gardner v. Walsh*, 5 El. & B. 89; *Bowers v. Briggs*, 20 Ind. 139; *Henry v. Coats*, 17 Id. 161; *Wallace v. Jewell*, 21 Ohio St. 163; 8 Am. Rep. 48; *Dickerman v. Miner*, 43 Iowa, 508; *City of Montgomery v. Hughes*, 65 Ala. 204.

Variations of the contract of suretyship which operate the discharge of the surety must, however, be such as are material, and change the legal import of the instrument, assuming the genuineness of the paper thus modified. Interlineations and changes may be made in the paper which evidences the liability, or in the words which express it, without destroying the validity of the contract, provided such modifications do not go beyond the mere form of the undertaking, or beyond the expression of the obligation which the law ascribes to it, in the absence of such expression, by implication. But if the alterations exceed these limits, and change the real meaning of the undertaking which the parties have entered into, whether presumptively to the detriment or advantage of the surety, and whether the effect is to add to or take from the liability, by the introduction of additional parties or otherwise, the surety is discharged: *United States v. Tillotson*, 1 Paine, 305; *Taylor v. Johnson*, 17 Ga. 521; *O'Neal v. Long*, 4 Cranch, 60; *People v. Brown*, 2 Doug. (Mich.) 9; *Portage Br. Bank v. Lane*, 8 Ohio St. 405.

There is another important limitation on the general doctrine which we have been considering, applicable to contracts generally, and exerting its influence on contracts of suretyship as well as all others. It is now well settled in this country, though the contrary rule formerly prevailed, and does yet to a large extent in England, that erasures, interlineations, spoliations, and changes, made in and of contracts by strangers to them, however material, abstractly considered, are, in legal contemplation, wholly immaterial, and ineffective to give to the instrument any other or different meaning or operation than that which attached to it before such intermeddling: *Brown v. Jones*, 3 Port. 422; *Davis v. Carlisle*, 6 Ala. 709; 1 Greenl. Ev., secs. 565-568; *Byles on Bills*, 323, and notes; 2 *Parsons on Contracts*, 716 et seq.

In this case, it is averred by the defendants Anderson and Reeves that after the bond had been signed by them and their principal, it was delivered to and accepted and approved by the sheriff. It was the latter's duty to pass on the sufficiency of the bond as to amount and solvency. When he accepted and approved it, with these names on it, the contract was complete, and his duties, so far as the execution of the instrument was concerned, were then at an end. His further duty with respect to the bond was to file it in the office of the clerk of the court: Code 1876, secs. 2942, 2946. The sheriff was merely the agent of the law to take the bond of the defendant, payable to the plaintiff, and return it into court. After taking it, he had only the naked custody for a particular purpose, and not to extend beyond a given time. In all other respects, and for all other purposes, he was an utter stranger. Of course, the defendant Aycock was also a stranger to the contract. The addition of Aycock's name as an obligor, after the undertaking had thus been perfected, was the act of these two strangers to it, the one inducing and accepting the signature, and the other signing. Under this state of facts, the alteration was no alteration in point of law. No change in the *status* of the parties was effected by it; nothing was added to or taken from their rights or liabilities; and the contract is to be treated by the parties as if the matter thus injected into it was not a part of the paper, as it is not a part of the undertaking which the paper evidences. The second plea of Anderson and Reeves discloses that the contract had thus been altered by strangers to it,—a fact which could exert no influence on their liability; and the plea presented, therefore, an immaterial issue. The demurrer to it was properly sustained: *United States v. Spalding*, 2 Mason, 478.

Contracts made on Sunday are absolutely void: Code, sec. 1749. A contract delivered on Sunday is a contract made on that day, within the meaning of this statute: *Flanagan v. Meyer*, 41 Ala. 132; *Burns v. Moore*, 76 Id. 342. The contract of the defendants, while running to the plaintiffs, and inuring to their benefit, was required by law to be made, and could only be made, with the sheriff. If delivered to him on Sunday, it was absolutely void, and imported no liability whatever. The plaintiffs had, and could have had, no connection with the making of the contract, and no control over the sheriff's action in relation to it. To hold that it was not void as between the plaintiffs and defendants, would be to add an-

other term to the statute, and make it inapplicable to public officers, and inuring to third persons. The case of *Salmarsh v. Tuthill*, 18 Id. 390, is not in point. That adjudication related to a negotiable instrument, and depended for the result reached on the general principle which frees commercial paper from infirmities of which subsequent holders have no notice. Besides, the present statute "is more sweeping and vitiating in its effect than the act of 1803," under which that case was decided; and "all contracts," of whatever nature, are rendered void by it, if made on Sunday, unless they fall in one of the classes of cases specially excepted: *Burns v. Moore*, *supra*. It was not necessary, therefore, for the third plea of Anderson and Reeves to aver the complicity of the plaintiffs in the execution of the contract, and the demurrer to that plea should have been overruled.

Fairly construed, the plea interposed by Aycock is an averment that he was fraudulently induced to sign the bond after it had been accepted and approved. This goes to the consideration. The purpose of the bond was to secure to the principal the possession of the property. When the sheriff had accepted and approved the bond, as this plea alleges he did, the right to possession was perfect, and the duty on the part of the sheriff to deliver possession was absolute. It was immaterial whether possession had actually passed. The bond could have no other effect than to create this right, and corresponding duty as to the possession. If these existed by reason of the acceptance and approval of the bond before it was signed by Aycock, it was without consideration as to him; and he should have been allowed to prove these facts if he could: *Jackson v. Jackson*, 7 Ala. 791; *Ruledge v. Townsend*, 38 Id. 706; *Brandt on Suretyship*, 9.

This plea of Aycock also disclosed that his signature constituted an alteration of the contract made by him through a mistake of fact, being misled by the sheriff so to do; and on this ground, also, we hold that it was well pleaded, and the demurrer to it was properly overruled.

Reversed and remanded.

SURETYSHIP — ALTERATION OF INSTRUMENTS. — An alteration made by one not a party to a contract without the privity of any of the parties thereto is not material, and will not affect the liabilities of those who are bound by it: *Note to Woodworth v. Bank of America*, 10 Am. Dec. 269. As to a release of sureties by alterations in the contract: *Note to First National Bank v. Gerke*, 6 Am. St. Rep. 459, 460; compare *Simonsen v. Grant*, 36 Minn. 439; *Womack v. Paxton*, 84 Va. 9.

SURETYSHIP — WHAT RISK SURETY ASSUMES, and the nature of the contract of indemnity: *Sefton v. Hargett*, 113 Ind. 592; *Bank of Monroe v. Gifford*, 72 Iowa, 750.

SUNDAY — CONTRACTS. — The validity of contracts entered into on Sunday depends upon the statutory provisions of the state where the contract is made: Note to *Coleman v. Henderson*, 12 Am. Dec. 292. A master cannot compel his minor servant to work on Sunday, in violation of the law, under a contract for the servant's services for a specified time: *Hunt v. Adams*, 81 Me. 356.

SCHLOSS v. MONTGOMERY TRADE COMPANY.

[87 ALABAMA, 411.]

CORPORATIONS — PROOF OF CORPORATE EXISTENCE. — When, to an action by a corporation, the plea of *not a corporation* in proper form is interposed, the burden is on the plaintiff to prove its corporate existence, either by producing its charter or articles of incorporation, or by some admission on the part of the defendant, or by showing a state of facts which will operate as an estoppel.

CORPORATIONS — ESTOPPEL TO DENY CORPORATE EXISTENCE. — In action by corporation suing as such against a subscriber to its capital stock before incorporation, the payment by the defendant of former installments as called for, and an averment that the installment sued for had been "duly and regularly called in by the plaintiff, and demand therefor made upon the defendant," do not, standing alone, show an estoppel against him to deny the existence of any corporation.

CORPORATIONS. — ALABAMA STATUTE, CODE OF 1886, SECTION 1663, HAS CHANGED the rule of the common law, so as to authorize the organization of a business corporation before all of the capital stock has been subscribed for.

ACTION commenced September 15, 1888, against Schloss and Kahn, as partners, by the "Montgomery Trade Company, a corporation," as described in the complaint, or "a corporation organized under the laws of Alabama," as described in the summons. The complaint contained a special count which claimed three hundred dollars "due on account of the subscription by defendants, in writing, to the capital stock of plaintiff, with interest thereon from January 9, 1888"; and it was averred "that said defendants subscribed, by instrument in writing, to fifteen shares of the capital stock of said company, of the par value of one hundred dollars per share; that said defendants paid all of said subscription, except twenty per cent thereof; that on the 9th of January, 1888, the said twenty per cent was duly and regularly called in by the plaintiff, and demand therefor made upon said defendants, but they neglected and refused to pay the same, and still neglect," etc.

The defendants demurred to the special count, upon the ground that it did not allege or show that the plaintiff was ever legally incorporated, nor that the plaintiff had ever tendered to the defendants a certificate for their stock, or was ready to issue such certificate. The demurrer was overruled, and the defendants filed several pleas, the first and sixth of which denied the plaintiff's corporate existence, and to these the court sustained a demurrer of the plaintiff. Other facts appear in the opinion.

Arrington and Graham, for the appellants.

Tompkins and Troy, contra.

SOMERVILLE, J. It is true that where one contracts with an alleged corporation, as such, and in such manner as to recognize its corporate existence *de jure* or *de facto*, he will often be estopped to deny the fact thus admitted, whether the denial go to the question of an originally legally organized body, or to that of a cessation of corporate existence. These are cases where the action is brought against one who contracts with the plaintiff in its real or asserted corporate capacity.

But this principle has no reference to cases where a subscription for stock is made by one in anticipation of organizing a corporation which is at the time only in process of formation. "The rule that a person contracting with a corporation recognizes thereby its capacity to contract, and cannot afterwards deny it in that transaction, does not apply to one who subscribes before incorporation. He may insist upon the organization of a regular and legal corporation": *Cook on Stock and Stockholders*, secs. 185, 186, and cases cited in note 2, p. 173.

It is perfectly well settled that before a suit can be maintained by an alleged corporation, although it may not be necessary to prove the legality of the existence of such corporation, its actual or *de facto* existence must be proved, or else a state of facts shown which will operate to estop the defendant from denying such *de facto* existence. When the plea of *null tiel* corporation in proper form is interposed, in the absence of any regulating statute on the subject, the burden is on the plaintiff corporation, if private, to prove its existence, either by production of its charter or articles of corporation, or by some express or implied admission on the part of the defend-

ant, or else to show an estoppel which precludes a denial of the fact: 2 Morawetz on Corporations, 2 ed., secs. 770, 772, 774, 776; *Lehman v. Warner*, 61 Ala. 455. The act approved February 26, 1889 (Acts 1888-89, p. 57), provides that when a suit is brought by a corporation, the plaintiff must not be required to prove the existence of such corporation, unless the same is denied by sworn plea, filed within the time allowed for filing pleas in abatement. But that act was not in force when the present case was tried, and hence did not govern it.

A subscriber to stock may, like any other person, be estopped from disputing the *de facto* existence of a corporation, especially as against creditors, where he attends the meetings of stockholders, or otherwise participates in the business of the company, thereby inducing others to act upon the faith of his admissions to their prejudice, or for his benefit. "But to warrant holding a person estopped from disputing the existence of a corporation, on the ground that he has co-operated in its organization and action, the acts shown must be unmistakably corporate acts": 2 Herman on Estoppel, sec. 1247. If the act done or admission made is just as consistent with the existence of an unincorporated association as of one incorporated, its ambiguous character will be so equivocal as not to raise an estoppel: *Fredenburg v. Lyon Lake M. E. Church*, 37 Mich. 476.

Conceding that the mere description of the plaintiff in the title of the cause as "a corporation" is sufficient, without any positive averment in the complaint of its corporate character, or without alleging whether it is a foreign or domestic corporation, defendants, in their first and sixth pleas, deny that there was at the commencement of this suit any such corporation as the Montgomery Trade Company,—the name in which the suit is brought. This cast on the plaintiffs, under the principles above stated, the burden, either to prove their corporate existence *de jure* or *de facto*, by admission of the defendant, or by production of their charter, with some evidence of user or acceptance, or by other competent evidence, or else to show an estoppel which would operate to preclude the defendant from denying the plaintiff's corporate existence. The only fact relied on to raise such estoppel, suggested in the demurrer to these pleas, is the conduct of the defendants in having paid all of their subscription for the fifteen shares of stock except the twenty per cent here sued for, which latter sum is alleged to have been "duly and regularly called in by the plaintiff,

and demand therefor made upon said defendants," which they refused to pay. We perceive no element of estoppel in this fact, standing alone. The circumstances under which this subscription was paid are nowhere stated. It does not appear that it was called for by assessments made even under color of corporate organization or capacity. The payment made does not imply a recognition of corporate existence, or of an unequivocal corporate act performed by the plaintiff, or any participation by the defendants in the corporate meetings or proceedings. There is nothing inconsistent between the facts alleged in the complaint, and the fact of defendants' payment of eighty per cent of their subscription preliminary to any corporate organization then contemplated, or in anticipation of such event: *Somerset & K. R. R. Co. v. Cushing*, 45 Me. 524; *Cabot v. Chapin*, 6 Cush. 51; *Kansas City Hotel v. Harris*, 51 Mo. 464; *Knox v. Childersburg Land Co.*, 86 Ala. 180.

The fact that all the capital stock was not subscribed for might have been a good defense to this suit against the defendants, under the general rule of law, apart from the statute: *Cook on Stock and Stockholders*, sec. 176. But the statute has changed this rule, so as to authorize the organization of corporations of the class to which plaintiffs *prima facie* belong, upon the payment of fifty per cent of the proposed capital stock, which may have been subscribed: Code 1886, sec. 1663; Code 1876, sec. 1806; Acts 1882-83, p. 5.

The other contentions of appellant are without merit.

It follows from what we have said that the city court erred in sustaining the demurrer of the plaintiff to the first and sixth pleas of the appellants, but not in sustaining the demurrers to the other pleas.

Reversed and remanded.

CORPORATIONS — ACTIONS BY. — A corporation suing must prove its incorporation under the general issue: *Welland Canal Co. v. Hathaway*, 8 Wend. 480; 24 Am. Dec. 51, and note 53; *Selma etc. R. R. v. Tipton*, 5 Ala. 787; 39 Am. Dec. 344; *Harris v. Muskingum Mfg. Co.*, 4 Blackf. 267; 29 Am. Dec. 372, and note; *Phenix Bank v. Curtis*, 14 Conn. 437; 26 Am. Dec. 402, 409; but compare *Inhabitants of Orono v. Wedgewood*, 44 Me. 49; 69 Am. Dec. 81; *West Windsted Ass'n v. Ford*, 27 Conn. 282; 71 Am. Dec. 66; *Harrison v. Martinsville etc. R. R. Co.*, 16 Ind. 505; 79 Am. Dec. 447; compare *Commercial Bank v. Pfeiffer*, 106 N. Y. 242. But see also *Harrison v. Martinsville etc. R. R. Co.*, *supra*, where it is held that pleading the general issue admits corporate existence. The existence of a corporation is proved by a recital of a United States patent that plaintiff is "a corporation existing under the laws of the state": *Southern P. R. R. Co. v. Purcell*, 77 Cal. 60; compare *Fresno Canal etc. Co. v. Warner*, 72 Cal. 379.

CORPORATIONS. — Ordinarily, the validity of corporate existence cannot be collaterally assailed: *Duggan v. Colorado etc. Co.*, 11 Col. 113; *Southern P. R. R. Co. v. Purcell*, 77 Cal. 69; *State v. Fuller*, 96 Mo. 165; *Haskell v. Worthington*, 94 Id. 560.

CORPORATIONS — ACTIONS AGAINST. — When a corporation is defendant, the statute does not require that its charter should be set out, or even that it should be alleged by what authority defendant was made a corporation: *Houston Water Works v. Kennedy*, 70 Tex. 233. No recovery can be had against one corporation for services rendered to another corporation on the ground that the two corporations are identical, there having been only a change in name, unless such fact is distinctly alleged and proved: *McGregor v. Fuller Implement Co.*, 72 Iowa, 143.

ESTOPPEL TO DENY CORPORATE EXISTENCE by contracting with the corporation: See *Snyder v. Studebaker*, 19 Ind. 462; 81 Am. Dec. 415, and note 419; *Welland Canal Co. v. Hathaway*, 8 Wend. 480; 24 Am. Dec. 51, 59, 60. One who has contracted with an apparent corporation as such is estopped in an action upon such contract to deny the existence of the corporation: *Fresno Canal etc. Co. v. Warner*, 72 Cal. 379.

DUDLEY v. COLLIER.

[87 ALABAMA, 481.]

CORPORATIONS — RESTRICTIONS BY STATE ON RIGHT OF FOREIGN CORPORATIONS TO TRANSACT BUSINESS WITHIN SUCH STATE. — Under Alabama constitution of 1875, article 14, section 4, no foreign corporation has authority to transact business in that state without having at least one known place of business, and an authorized agent or agents therein. And a subsequent statute declares that "it shall not be lawful" for any person to act as agent, or transact any business for or on behalf of any such corporation, until such constitutional requirement is complied with: *Sess. Acts 1886-87*, pp. 102-104. Without compliance with the conditions thus imposed, a foreign corporation engaged in the business of loaning money on mortgages, and it was held that an agent of the corporation could not maintain an action to recover compensation agreed to be paid him for procuring a loan from the corporation.

Watts and Son, and Williamson and Williams, for the appellant.

Roquemore, White and Long, and W. R. Houghton, contra.

SOMMERVILLE, J. The suit is brought by the appellees for a stipulated compensation agreed to be paid them by the appellant, Dudley, for services rendered in procuring a loan of money for his use.

The court sustained a demurrer to the sixth, seventh, and ninth pleas jointly, and this ruling is assigned as error. If either of these pleas constituted a good defense, the ruling is erroneous.

The sixth plea avers that "the loan and contract of borrowing were to be made with a foreign corporation, company, or association having no authority to do any business within the state of Alabama, and that an agreement to pay the borrowed money and interest thereon, and to make a mortgage upon lands in this [Lowndes] county [Alabama], was to be made with a foreign corporation, located in Great Britain, known as the — of London, England; and the said corporation had no known place of business nor authorized agent within the state of Alabama, and had never been authorized, under the laws of Alabama, to do business within the state of Alabama, and that the plaintiffs were in fact the agents of such corporation."

It is declared in article 14, section 4, of our present constitution, that "no foreign corporation shall do any business in this state without having at least one known place of business and an authorized agent or agents therein": Const. 1875, art. 14, sec. 4. We have construed this to be a police regulation; "just as much," we said, "a police regulation for the protection of the property interests of the citizens of the state as a law forbidding vagrancy among its inhabitants": *American Union Tel. Co. v. Western Union Tel. Co.*, 67 Ala. 26; 42 Am. Rep. 90. The general assembly passed an act approved February 28, 1887, to give force and effect to this section of the constitution, in which it required that every foreign corporation or company, before engaging in business in this state, shall file in the office of the secretary of state an instrument in writing, under seal of such company, and signed officially by the president and secretary, "designating at least one known place of business in the state, and an authorized agent or agents residing thereat." It is declared that "it shall not be lawful" for any person to act as agent, or transact any business, directly or indirectly, for or on behalf of any such company or corporation, until this requirement is complied with. Any one who shall act as such agent, or transact any business for such foreign company, without having first complied with such requirement, is subjected to a penalty of five hundred dollars, payable to the state. The company itself that transacts or engages in any business in this state, before filing such instrument, is liable to a penalty of one thousand dollars: Acts 1886-87, pp. 102-104.

The contract for services here sued on bears date March 8, 1887, and is therefore subsequent to the foregoing prohibitory enactment. The case, then, is reduced simply to this, assum-

ing the facts stated in the plea to be true, as admitted by the demurrer: The plaintiffs are the agents of a foreign corporation which has failed to comply with the requirements of this statute. Neither the corporation nor the agents, therefore, are authorized to transact any business in Alabama. A loan or borrowing of money by or from such company, in this state, is an unlawful act, subjecting both the agents and the company to a heavy penalty. The services here sued for are for the doing of this prohibited act. The consideration of the defendant's promise is an act in express violation of the constitution and laws of Alabama. The contract to pay for such illegal services is itself necessarily illegal, as a promise made in consideration of an act forbidden by law; and being executory, the courts will not lend their aid to its enforcement.

It is an established rule of law, supported by uniform authority, that when a statute goes no further even than to impose a penalty for the doing of an act, a contract founded on such act as a consideration is void, although the statute does not pronounce it void, nor expressly prohibit it: *Woods v. Armstrong*, 54 Ala. 150; 25 Am. Rep. 671, and note 675-678. In the present case, there is both a penalty and an express prohibition.

In *Woods v. Armstrong*, *supra*, it was accordingly held, where a statute of this state imposed a penalty for selling any fertilizer which had not been inspected, analyzed, and stamped in the mode prescribed by law, a note given for the purchase-money of such fertilizer sold in violation of this requirement was void. This ruling has been followed by us in many other cases.

In *Milton v. Haden*, 82 Ala. 30, 70 Am. Dec. 523, a note given for the lease of a ferry was held void, on the ground that the lessor had no license, and the running of an unlicensed ferry was prohibited under penalty.

In *Harrison v. Jones*, 80 Ala. 412, we held that no recovery could be had for medical services rendered by an unlicensed physician, the practice of medicine in this state without such license being impliedly prohibited by a penalty. This ruling rests upon the general principle that when a statute forbids under a penalty, or otherwise, the carrying on of any particular business without a license, a contract made for services rendered, or goods sold, in violation of the requirements of such statute, is void; especially if it appears that the object of the legislature was for police purposes, and not solely for

the purpose of raising revenue; or in other words, where the legislative intent, in imposing the condition, was "the maintenance of public order or safety, or the protection of the persons dealing with those on whom the condition is imposed." Such, at least, seems to be the better and later view, sustained by the more recent authorities: 3 Am. & Eng. Ency. of Law, 872; Bishop on Contracts, sec. 547; Greenhood on Public Policy, 580-583. Mr. Wharton states the rule as follows: "When a statute imposes a penalty, not as a tax, but as a punishment, then a contract to do the thing on which the penalty is imposed is ordinarily unlawful; and so when an act is absolutely prohibited. And when conditions on the exercise of a business are imposed in a statute for the maintenance of public order, or the protection of parties, or on grounds of public policy, the contracts by such persons, in violation of the statute, are void": 1 Wharton on Contracts, sec. 365; *Melchoir v. McCarty*, 31 Wis. 252; 11 Am. Rep. 605; *Robertson v. Hays*, 83 Ala. 290; *Prescott v. Battersby*, 119 Mass. 285; *Buxton v. Hamblen*, 32 Me. 448.

In the present case, it is perfectly manifest that the act of February 28, 1887, above cited, does not contemplate the assessment of the penalties imposed for revenue, but only for punishment. It is even provided that in case of non-payment of such penalties, the offending party shall be imprisoned, or sentenced to hard labor, for a period not exceeding six months: Acts 1886-87, p. 10.

The case of *Thorne v. Travelers' Ins. Co.*, 80 Pa. St. 15, 21 Am. Rep. 89, is one not unlike this in principle. The statutes of Pennsylvania provided that any foreign insurance company desiring to transact business in that state should first appoint a resident agent in that state, on whom process could be served, and file in the office of the auditor-general a certified appointment of such agent, and a copy of the company's charter. A written application for a license to transact business in the state, signed by such agent, was also required to be filed in some public office, with a bond of the agent with a specified sum, with resident securities, approved in the mode and on the conditions prescribed. An agent who transacted any insurance business in the state for such foreign company without previous compliance with the provisions of the statute, including the procuring of the license, was made guilty of a misdemeanor, and subjected to a fine of five hundred dollars. The conditions of the statute not having been complied with

by the plaintiff insurance company, it was held that a suit against the agents and the sureties on his bond would not lie for moneys collected by the agent in the course of his agency. The principle on which this conclusion was based is, that the doing of the business by the agent was expressly prohibited by the statute, and was authorized by the company, and that no recovery could be had on the bond without proving that the company and the agent had both violated the law; or in other words, without the aid of the illegal transaction the company had no case.

Under the principles settled by the foregoing authorities, to which many others might be added, we are of opinion that the facts stated in the sixth plea constituted a good defense to the action, showing that the contract of loan was one in violation of the statute, and void, therefore, for illegality. The promise of the defendant as a consideration for procuring such a loan was equally illegal and void, as an agreement to pay for the doing of an act prohibited by law, and punishable by a penalty.

Analogous statutes in other states regulating the doing of business by foreign corporations have been frequently construed by the highest courts of those states in accordance with the views which we have above expressed: *Cincinnati Assur. Co. v. Rosenthal*, 55 Ill. 85; 8 Am. Rep. 626; *Aetna Ins. Co. v. Harvey*, 11 Wis. 394, 412; *Hoffman v. Banks*, 41 Ind. 1; *Union Cent. Life Ins. Co. v. Thomas*, 46 Id. 44; *Bank v. Page*, 6 Or. 431; *In re Comstock*, 3 Saw. 218; *Semple v. Bank*, 5 Ind. 88; *Williams v. Cheney*, 3 Gray, 215; *Jones v. Smith*, 3 Id. 500; 2 Morawetz on Corporations, 2d ed., secs. 661-665.

Whether a foreign corporation, when sued, could take advantage of its own failure to comply with the requirements of the statute by setting up the invalidity of its contract, presents another question, which does not arise in this case: *Brooklyn Life Ins. Co. v. Bledsoe*, 52 Ala. 538.

The case of *Sherwood v. Alvis*, 83 Ala. 115, 3 Am. St. Rep. 695, was based on a transaction occurring prior to the enactment of the above statute enforcing the constitutional provision; and what was said in that case in reference to the effect of this statute was not necessary for the decision of the case. The mortgage securing the loan, moreover, had been foreclosed under the power of sale, so as to cut off the equity of redemption, and the transaction was, in a measure, an executed contract. We held that, in such a case, an action of

ejectment for the land purchased at the mortgage sale would lie by the purchaser. That case is, on these and other grounds, distinguished from this: *Elston v. Piggott*, 94 Ind. 14.

The court erred in sustaining the demurrer to the pleas; and for this error the judgment must be reversed, and the cause remanded.

Reversed and remanded.

CORPORATIONS, FOREIGN. — Contracts with foreign corporations are not void, though disregarding the constitutional provisions in Alabama requiring foreign corporations to have a resident agent before they can lawfully engage in business in that state: *Sherwood v. Abie*, 83 Ala. 115; 3 Am. St. Rep. 695, and note 699; compare *American U. Tel. Co. v. Western U. Tel. Co.*, 67 Ala. 26; 42 Am. Rep. 90, as to the inability of a state to exclude a foreign telegraph company from its boundaries. But a foreign insurance company cannot make contracts which it can enforce until it complies with the state laws regulating insurance companies: *Cincinnati etc. Assur. Co. v. Rosenthal*, 55 Ill. 85; 8 Am. Rep. 626; compare *Thorne v. Travelers' Ins. Co.*, 80 Pa. St. 15; 21 Am. Rep. 89. As to rights of a foreign corporation doing business in another state, see note to *Young v. South Tredegar Iron Co.*, 4 Am. St. Rep. 760. A foreign corporation organized to act as general agent of its members, and employing no capital in the state, is not subject to the provisions of law requiring a statement showing its title, object, and the location of its offices and the names of its agents within the state: *Kilgore v. Smith*, 122 Pa. St. 48. Corporations are the creatures of the state where found, and have no right of recognition in other states except upon the terms which those states prescribe, and therefore they are not citizens under article 4 and article 14 of the amendments to the United States constitution: *List v. Commonwealth*, 118 Pa. St. 322. The domicile of a corporation is deemed to be in the county where it has its principal office and place of business: *Holgate v. Oregon P. R. R. Co.*, 16 Or. 123. In Virginia, service upon a corporation, whether resident or foreign, must be upon an officer or agent resident in that state: *Dillard v. Central V. Iron Co.*, 82 Va. 734.

CORPORATIONS — POWER OF A STATE TO DISCRIMINATE against foreign corporations: See note to *Ducat v. Chicago*, 95 Am. Dec. 536.

CONTRACTS, WHAT ARE VOID BY STATUTE: See *Woods v. Armstrong*, 54 Ala. 150; 25 Am. Rep. 671, and extended note 674-678.

GRAVES v. SMITH.

[87 ALABAMA, 450.]

PARTY-WALLS — OWNERSHIP, AND RIGHT TO INCREASE HEIGHT OF. —

When a party-wall is erected, one half on the land of each adjoining proprietor, they do not own it as tenants in common, but each is the owner in severalty of his half, with an easement of support in his neighbor's half; and each may increase the height of his half of the wall, at least, if not of the entire party-wall, when it can be done without damage to the other proprietor.

PARTY-WALL MUST ORDINARILY BE CONSTRUED TO MEAN A SOLID WALL, without windows or openings; and in the absence of statutory regulation, or express agreement between the parties, neither has the right to make windows or openings in the wall; and such right is not conferred by an agreement giving either one the right "to use said party-wall free of expense in the erection of any building which he may wish to erect on said lot."

INJUNCTION.—ONE PART OWNER OF PARTY-WALL MAY BE ENJOINED, at the suit of the other, from making windows or other openings in the wall.

Martin and McEachin, Graves and Blakey, and Watts and Son, for the appellant.

Webb and Tillman, contra.

SOMERVILLE, J. The bill was filed by the appellee, Smith, to enjoin the appellants from raising the height of a party-wall, with windows and openings constructed in it, so as to impair it as a dead or solid wall. The wall was two stories high, and eighteen inches thick, being so constructed as to occupy nine inches of each of the adjoining lots of the complainant and the defendant Graves respectively, the former holding under one Wright by purchase. It was agreed in writing between Graves and Wright—and it is not denied that this covenant so runs with the land as to bind Smith—"that the said wall is, and always shall remain, a party-wall between the said owners of said lots, their heirs and assigns; and the said William H. Graves, his heirs and assigns, shall have the right to use the said party-wall free of expense in the erection of any building which he or they may wish to build upon said lot."

The agreement in terms creates a party-wall out of this division wall; and by a party-wall we must understand a wall between the estates of adjoining owners which is used for the common benefit of both, chiefly in supporting the timbers used in the construction of contiguous houses on such estates: 1 Washburn on Real Property, 5th ed., 385. Where such a wall is erected, one half on the land of each adjoining proprietor, it does not render them tenants in common, but each is the owner in severalty of his part, both of the wall and the land on which it stands; but the title of each is qualified by a cross-easement in favor of the other, which entitles him to support his building by means of the half of the wall belonging to his neighbor. In other words, each proprietor owns his own half in severalty, with an easement of support from the other half of his neighbor's: *Bloch v. Isham*, 28 Ind. 37; 92 Am. Dec.

287, note 291, 292; 2 Washburn on Real Property, 5th ed., 386; Tiedeman on Real Property, sec. 620. It is commonly held that each part owner may certainly increase the height of his half of the wall, or so much as stands on his own land, if he does not thereby endanger or injure the wall, he being responsible for the resulting damage occasioned by any change in the structure not required for repairs: *Andrae v. Haseltine*, 58 Wis. 395; 46 Am. Rep. 635. And according to the better view, as supported by the weight of authority, each proprietor has the lawful right to increase the height of the entire party-wall, when it can be done without injury to the adjoining building, and without impairing the value of the cross-easement, to which the neighboring proprietor is entitled: *Brooks v. Curtis*, 50 N. Y. 639; 10 Am. Rep. 545; *Block v. Isham*, 92 Am. Dec. 295, note.

This right to raise the height of the wall, however, seems to be implied in the privilege conferred on Graves by the agreement which gives him "the right to use said party-wall free of expense in the erection of any building which he may wish to build upon said [adjoining] lot." This right, moreover, is conceded to the defendants, and no effort is made by the complainant to prevent the mere raising or increasing the height of the wall. The prayer for injunction goes only to restraining the insertion of the windows or openings.

There is no statute in this state regulating the subject of party-walls, as in England and some of the American states. The question is, therefore, to be determined by the principles of the common law bearing on easements of this nature. It is our opinion that a party-wall must ordinarily be construed to mean a solid wall without windows or openings. Such openings tend to weaken the strength of the structure, and impair its value for lateral support of the adjoining building. They prevent or render inconvenient the utilization of the wall for the erection of an additional story for the building. They also increase the hazards of fire, and injuriously affect the adjoining proprietor by unduly exposing his premises in various other objectionable ways, which readily suggest themselves without any elaborate enumeration. If allowed to continue, moreover, for a period of twenty years, the privilege of the adjoining owner would mature into a perfect legal right under the doctrine of prescription: *Ulbricht v. Eufaula Water Co.*, 86 Ala. 587; 11 Am. St. Rep. 72. The cross-easement which the appellee had in the wall was, in our opinion, vio-

lated by the attempt of the defendants to create the openings for the windows sought to be restrained by injunction.

It is too obvious for argument that the doctrine of ancient lights has no sort of bearing on this case in any aspect in which it can be viewed. The difference is between the maintenance of windows in one's own walls and those of another.

The authorities fully support this view, and leave no doubt of the jurisdiction of equity to interfere in such cases by injunctive relief: *Dauenhauer v. Devine*, 51 Tex. 480; 32 Am. Rep. 627; *Vaneyckle v. Tryson*, 6 Phila. 401; *Sullivan v. Grafton*, 35 Iowa, 581; *Bloch v. Isham*, 92 Am. Dec. 297, note; *St. John v. Sweeney*, 59 How. Pr. 175; *Vollmer's Appeal*, 61 Pa. St. 118.

The case of *Weston v. Arnold*, L. R. 8 Ch. 1090, seems to support the view that a wall may be a party-wall to such height as it belongs in common to two adjoining buildings, and cease by implication to be such for the rest of its height; but this decision is opposed to the weight of authority, and we decline to approve it.

The chancellor did not err in granting the relief prayed in the bill, and in perpetuating the injunction on the proof made in the case.

Affirmed.

PARTY-WALLS — WHAT CONSTITUTE. — For definition and nature of party-walls, as well as the law respecting windows and openings in party-walls, see extended note to *Bloch v. Isham*, 92 Am. Dec. 289-306; *Moloney v. Dixon*, 65 Iowa, 136; 54 Am. Rep. 1.

PARTY-WALLS, INCREASING THE HEIGHT OF: See *Brooks v. Curtis*, 50 N. Y. 639; 10 Am. Rep. 545; *Andrus v. Haseltine*, 58 Wis. 395; 46 Am. Rep. 635; *Dauenhauer v. Devine*, 51 Tex. 480; 32 Am. Rep. 627.

TEAGUE v. MARTIN.

[87 ALABAMA, 500.]

FRAUDULENT CONVEYANCE — WHEN BILL TO CANCEL AS CLOUD ON TITLE WILL NOT LIE. — Purchaser of land at sheriff's sale, under execution against a debtor who has fraudulently conveyed the land to his vendee, has a plain and adequate remedy at law by action of ejectment, and cannot, while out of possession, maintain a bill in equity to cancel the fraudulent conveyance as a cloud on his title.

BILL filed by Teague against Martin, seeking to have canceled a fraudulent conveyance, as a cloud on the complain-

ant's title to certain land. The complainant bought the land at sheriff's sale under execution against one Burns, who had previously executed a conveyance of the land to the defendant, Martin, which conveyance was alleged to have been made with the fraudulent intent of hindering and delaying the grantor's creditors. The chancellor dismissed the bill, and his decree is assigned as error.

Kelly and Smith, for the appellant.

SOMERVILLE, J. In *Smith v. Cockrell*, 66 Ala. 64, it was held that a purchaser of land at a sheriff's sale, under execution against a debtor who has made a fraudulent conveyance of the legal title to his vendee, had a plain and adequate remedy at law by action of ejectment, and, for this reason, he cannot, before recovery of possession, file a bill against the purchaser to cancel the fraudulent deed as a cloud on his title. I dissented from the conclusion reached by the majority of the court in that case, and have had no reason to change my opinion as then expressed, in support of which I might add other authorities if I were disposed to reopen the discussion: *Sands v. Hildreth*, 14 Johns. Ch. 493; *Hildreth v. Sands*, 2 Id. 36; *Leigh v. Everhart's Ex'r*, 4 T. B. Mon. 379; 16 Am. Dec. 160. But *Smith v. Cockrell*, *supra*, has been uniformly and many times followed since it was decided, and the practice is now settled in accordance with that ruling; and for this reason I am now disposed to follow it: *Grigg v. Swindall*, 67 Ala. 187; *Pettus v. Glover*, 68 Id. 417; *Betts v. Nichols*, 84 Id. 278.

On the authority of these cases, the bill in this case was properly dismissed, as being without equity.

Affirmed.

FRAUDULENT CONVEYANCES — CLOUD ON TITLE. — Purchaser at a judicial sale of realty, previously conveyed by the judgment debtor to defraud his creditors, has no ground for a bill in equity to cancel such fraudulent conveyance, because he has an adequate remedy at law: *Betts v. Nichols*, 84 Ala. 278, and other Alabama cases therein cited; compare *Munson v. Munson*, 28 Conn. 582; 73 Am. Dec. 693.

EQUITY — CLOUD ON TITLE. — Courts of equity will not, under pretense of removing a cloud, try the legal titles to realty, but will remit them to a court of law for that purpose: *Brewer v. Calumet etc. Co.*, 123 Ill. 104.

KNOX v. ARMISTEAD.

[87 ALABAMA, 511.]

MORTGAGES — PURCHASE BY MORTGAGEE AT SALE UNDER POWER. — Mortgagee who purchases at a sale made under a power to sell in the mortgage, the instrument not authorizing him to become the purchaser, thereby arms the mortgagor with the option, if expressed in a reasonable time, to affirm or disaffirm the sale, and this, without reference to the fairness of the sale or the fullness of the price. But the mortgage may expressly confer authority to purchase upon the mortgagee, and if he then becomes the purchaser, the mortgagor cannot disaffirm the sale, and be allowed to redeem, without alleging and proving facts which would generally invalidate a purchase by any one else under the same circumstances.

BILL filed by E. N. Knox against W. B. and E. S. Armistead, seeking to set aside a sale of land under a power in a mortgage. The material facts appear in the opinion.

R. M. Williamson, for the appellant.

Saysre, Stringfellow, and Le Grand, contra.

MCCLELLAN, J. On March 20, 1885, the appellant, being joined therein by his wife, Daisy Knox, executed to the appellees a mortgage on certain lands to secure them against a contingent liability, which they had assumed as accommodation acceptors for him.

The mortgage contained a power of sale, and an authorization to the mortgagees to purchase at any sale that should be had thereunder, in the following words: "In the event of said sale, the said W. B. Armistead and Son, or either of them, their heirs, assigns, agents, or attorneys, are authorized and empowered to purchase said property, the same in all respects as if they were strangers to this conveyance. And should they so purchase said property, the auctioneer making said sale is hereby directed and empowered to make and execute a deed to them for the same. And we do covenant with the said W. B. Armistead and Son that we will forever warrant and defend the title so made against the lawful claims and demands of all persons." The mortgagees, having had to pay their acceptance, sold the land under and in conformity with the mortgage, and, as alleged in the bill, Elliott Armistead, one of the firm of W. B. Armistead and Son, became the purchaser, and, with the said W. B., took, and has since held, possession of said land. The bill filed by E. N. Knox, relying on the naked facts above stated, and without in any manner, or with respect to any matter connected directly or

indirectly with the transaction, imputing fraud or unfairness, or bad faith, or oppression, or inadequacy of price, or a failure to comply with the terms of the instrument, "disavows said sale as an execution of the mortgage," and seeks to redeem the land from the mortgagee upon such terms as to the court may seem just. There was a demurrer to, and a motion to dismiss, the bill for want of equity. The demurrer was sustained, the bill dismissed, and the decree of the chancery court to that end is here assigned as error.

It is well settled in this state, in consonance with the general doctrine elsewhere, that where a mortgagee purchases at a sale made under a power to that end contained in the mortgage, the instrument not authorizing the mortgagee to become the purchaser, he thereby "arms the mortgagor with the option, if expressed in a reasonable time, of affirming or disaffirming the sale, and this, without reference to the fairness of the sale or the fullness of the price": *Garland v. Watson*, 74 Ala. 324; *Harris v. Miller*, 71 Id. 26; *Ezzell v. Watson*, 83 Id. 120.

Such sales, it is manifest, are not absolutely void, but voidable only at the election of the mortgagor. Doubtless he might effectually ratify the sale immediately after its consummation, so at least as to put on him the *onus* of affirmative impeachment of its fairness in any subsequent attack he might make upon it. It is axiomatic that an act which may be ratified is *in limine* capable of authorization. The point appears never to have been passed on in this court, but all the text-writers and adjudications of other courts, while maintaining in its severest integrity the doctrine of the cases cited above, are equally pronounced in the assertion of the correlative principle that the mortgage may expressly confer the power and authority to purchase upon the mortgagee and his exercise of that power in good faith will not vitiate the sale: Perry on Trusts, sec. 625; Tiedeman on Real Property, p. 290, sec. 365; 2 Story's Eq. Jur., sec. 1027, note 3; 2 Jones on Mortgages, sec. 1883; *Elliott v. Wood*, 45 N. Y. 71; *Hall v. Bliss*, 118 Mass. 554; 19 Am. Rep. 476; *Robinson v. Amateur Ass'n*, 14 S. C. 143.

Mortgagors are allowed to redeem from a mortgagee who has purchased under a power which did not authorize him to do so, on the theory that there has been no sale made, — no valid execution of the power. It would be to the last degree anomalous to allow that theory to obtain with respect to a sale and purchase made in strict harmony with the terms of the instrument, and in strict compliance with an authorization

which all the cases concur in holding the mortgagor was fully competent to make and bind himself by. To so hold would be to render nugatory an important stipulation of the contract entirely within the competency of the parties to enter into, and not offensive to any principle of law: *Perry on Trusts*, p. 166, sec. 602 y; *Doolittle v. Lewis*, 7 Johns. Ch. 45; 11 Am. Dec. 389.

The true rule, we apprehend, is stated in *Jones on Mortgages* to be, that the court will not interfere with a purchase by a mortgagee under such a provision, unless there be some other objection, which would generally invalidate a purchase by any one else under the same circumstances: 2 *Jones on Mortgages*, p. 730, sec. 1883.

The effect of such authorization is, at least, to waive the mortgagor's right to treat the trust as continuing, and to redeem from the purchasing mortgagee, without reference to the fairness of the sale, and to put upon him the onus of impeaching the transaction by appropriate allegation sustained by that measure of proof which is ordinarily essential to support affirmative averments. The bill in this case is devoid of such allegations, as we have seen; and the demurrer to it for want of equity was properly sustained.

Affirmed.

MORTGAGES. — A mortgage sale whereunder the mortgagee purchases, is not void, but merely voidable: *Allen v. Ransom*, 44 Mo. 283; 100 Am. Dec. 282, and cases in note 286, 287; *Blockley v. Fowler*, 21 Cal. 326; 82 Am. Dec. 747, and note 749; *Imboden v. Hunter*, 22 Ark. 622; 79 Am. Dec. 116, and note 122; *Emell v. Watson*, 83 Ala. 120.

MORTGAGE. — A mortgagee may buy the mortgaged property, or a part thereof, by private agreement, or under legal authority, but such a purchase extinguishes the mortgage debt to the extent of the value of the property purchased: *Clark v. Jackson*, 64 N. H. 398; *Blockley v. Brangan*, 26 S. C. 624.

MANNING v. MARONEY.

[57 ALABAMA, 568.]

PLEADING AND PRACTICE. — **SUSTAINING DEMURRER TO SPECIAL PLEA, IF ERROR AT ALL,** is error without injury when the same defense is equally available under the general issue, which was also pleaded.

PLEADING — WHEN PLEA VERIFIED BY AFFIDAVIT IS NECESSARY. — The complaint in an action by an indorsee against the drawer of a bill of exchange averred the instrument to be the property of the plaintiff, transferred to him by the indorsement of the payee, and there was no sworn plea (Ala. Code, secs. 2676, 2770) denying the fact of ownership. In

such case the validity of the transfer could not be questioned, and the bill was properly admissible in evidence.

EVIDENCE — ADMISSIBILITY IN, OF BILL OF EXCHANGE. — Bill of exchange is admissible as evidence in an action thereon without preliminary proof of demand, protest, and notice of dishonor, or a waiver of them, these facts being mere matter of defense; and the fact that it was mutilated, because of identifying words written on it by the commissioner, whom it was attached as an exhibit to a deposition, does not render it inadmissible as evidence.

EVIDENCE — CONTENTS OF PAPER WHICH IS BEYOND JURISDICTION OF COURT CAN BE PROVED BY SECONDARY EVIDENCE without accounting for the non-production of the paper.

PLEADING — EVIDENCE. — IT IS LONG-SETTLED RULE OF PLEADING AND EVIDENCE that facts which excuse demand and notice will, in law, be deemed proof of such demand and notice. Allegation of demand and notice may, therefore, be proved by any facts showing a waiver of them.

NEGOTIABLE INSTRUMENTS. — IF DRAWER OF BILL COUNTERMANDS INSTRUCTIONS to the drawee to pay it, he thereby dispenses with the necessity of protest and notice of dishonor to himself.

NEGOTIABLE INSTRUMENTS — SET-OFF. — BY EXPRESS PROVISION OF ALABAMA CODE, SECTION 2684, commercial paper negotiated for value before maturity is not subject to set-off or recoupment.

SET-OFF — PARTNERSHIP DEMAND AGAINST INDIVIDUAL CLAIM. — In an action on a bill of exchange brought by an indorsee against the drawer, a demand due from the payee to a partnership of which the defendant is a member, if available as a set-off in any case, is not so available unless it is made to appear that the other partners gave their consent to such use of the claim before the assignment of it to the defendant, and that the plaintiff had knowledge of their consent. The consent given at the trial cannot be made to relate back to the date of the assignment, so as to make the set-off good.

ACTION by Frank M. Maroney against William Manning, founded on a bill of exchange drawn by the defendant on Hill, Fontaine, & Co., and payable to the order of La Fayette Maroney, by whom it was indorsed to the plaintiff. The bill was for ninety dollars, dated October 23, 1886, and the drawees resided in Memphis, Tennessee. A special count in the complaint alleged that the bill was not paid or accepted on presentation and demand, the defendant having notified the drawees not to pay it. The court overruled a demurrer to the special count, and sustained a demurrer to the defendant's second plea, which averred a failure to present the bill sued on, and to give due notice of dishonor. Issue was joined on the pleas of *non assumpsit* and set-off. On the trial the defendant objected to the admission of the bill in evidence: 1. Because it did not appear on its face to be the property of the plaintiff; 2. Because it was mutilated; 3. Because there was no proof that it had ever been presented to the drawees

for acceptance or payment; 4. Because there was no proof of notice to the defendant of the bill's dishonor. These several objections were overruled, and the defendant excepted. The deposition of N. Fontaine, one of the drawees of the bill, taken on interrogatories, was offered in evidence by the plaintiff. The third interrogatory was, whether the bill had ever been presented to the drawees for payment or acceptance; and the witness answered that it was sent to them in a letter by one Winston, the plaintiff's attorney, "for remittance, and was returned to him by us, by letter, as Hill, Fontaine, & Co. had been instructed by letter from William Manning not to pay the same." The defendant objected that the answer of the witness Fontaine was not responsive to the interrogatory, and had relation to the contents of a written instrument, the loss of which was not accounted for. The objection was overruled, and the defendant excepted. One Cochran, a member of the firm of Jordan, Manning, & Co., called as a witness by the plaintiff, testified that he wrote a letter to Hill, Fontaine, & Co. at the instance of the defendant instructing them not to pay the bill in suit, and the defendant admitted that he had instructed Cochran so to write; but he objected to the admission of this evidence, on the ground that the letter was not produced, nor its absence accounted for. Under the plea of set-off, the defendant offered in evidence an account for \$13.84, in favor of Jordan, Manning, & Co. against L. Maroney, the payee of the bill, due November 18, 1886; also a note for \$85.60, executed by said Maroney to said firm, dated December 28, 1885, and due one day after date. It was proved that these claims were unpaid, and said Cochran testified that the defendant was a member of said firm at that time, and had the consent of all the members of the firm to use the account and note as a set-off against this action. The plaintiff, while testifying, stated: "Before I bought said bill of exchange from my brother, I knew that he was indebted to said Jordan, Manning, & Co., and had been to see them twice about his indebtedness." The court instructed the jury, "that unless the defendant held and owned said note and account prior to the indorsement of said bill of exchange to the plaintiff, and the plaintiff knew, at or before the transfer and indorsement of said bill to him, of said indebtedness by La Fayette Maroney to Jordan, Manning, & Co., and that the defendant owned the same, then the defendant was not entitled to claim the same

as a set-off in this action." The defendant excepted, and assigned error.

Lusk and Bell, for the appellant.

John G. Winston, Jr., and Watts and Son, contra.

SOMERVILLE, J. The defense set up in the second plea — viz., a failure to present the bill sued on, and to give due notice of dishonor — was equally available under the plea of the general issue, and the record shows that the defendant had the full benefit of it on the trial of the cause. Sustaining the plaintiff's demurrer to this plea is, for this reason, error without injury, if error at all: *Phoenix Ins. Co. v. Moog*, 78 Ala. 284; 56 Am. Rep. 31.

The objection interposed to the admission in evidence of the bill of exchange described in the complaint was not well taken. The instrument was averred to be the property of the plaintiff, transferred to him by the indorsement of the payee; and there was no sworn plea denying the fact of ownership. The validity of such transfer could not, therefore, be raised under the plea of the general issue: Code 1886, secs. 2676, 2770; Rule of Practice, No. 29, p. 810, Code 1886; *Agos v. Medlock*, 25 Ala. 281. The averment that the bill was indorsed to plaintiff by the payee is tantamount to an averment of the personal identity of the indorsee, F. M. Maroney, and the plaintiff, Frank M. Maroney.

There was nothing in the objection that the paper was mutilated, because of the memorandum indorsed on it by the commissioner for the purpose of identification, when it was attached as an exhibit to the deposition of the witness Fontaine; nor in the suggestion that preliminary evidence of demand, protest, and notice of dishonor, or waiver of them, should first have been offered before offering the paper. This was mere matter of defense, not necessary to be negatived by anticipation on plaintiff's part before introducing the paper. The execution of the paper by the drawee, moreover, was sufficiently proved, and it was admissible under the other counts of the complaint.

The contents of the letter written by order of the defendant, Manning, to the drawees of the bill, Hill, Fontaine, & Co., instructing them not to pay the bill, was properly admitted in evidence. We discover nothing in the record introduced on this point not entirely relevant. The drawees resided in Mem-

phis, Tennessee, and the letter was received by them there. Presumptively, it continued to remain out of the jurisdiction of the court, and was in Tennessee at the time of the trial. If the contrary was true, it should have been proved by the defendant. Where a paper is beyond the jurisdiction, its contents can be proved by secondary evidence without proving its loss or destruction: *Young v. East Ala. Ry Co.*, 80 Ala. 100; *Elliott v. Dyche*, 80 Id. 376; *Gordon v. Tweedy*, 74 Id. 232; 49 Am. Rep. 813.

It is objected that the statement as to the contents of the letter, which was disclosed by the witness Fontaine in his deposition, was not responsive to the third interrogatory, under which it was introduced. The inquiry made by this interrogatory was, whether the bill in suit had ever been "presented" to the drawees "for payment or acceptance." The answer shows both a presentation and excuse for non-payment, viz., a specific instruction of the drawer not to pay. The rule is settled as one of pleading and evidence, and was long ago announced in this state, that facts which excuse demand and notice will, in law, be deemed proof of such demand and notice. Allegation of these facts may, therefore, be proved by any fact showing a waiver of them; demand and notice, and waiver of them, being in law the equivalent of each other: *Kennon v. McRea*, 7 Port. 175; *Shirley v. Fellows*, 9 Id. 300; *Spawm v. Baltzell*, 1 Fla. 301; 46 Am. Dec. 346; *Hibbard v. Russell*, 16 N. H. 410; 41 Am. Dec. 733. The answer of the witness, in this view of the law, was responsive, and, as such, admissible, because the answer showed a good excuse for failure to give notice of dishonor to the defendant as drawer. "If the drawer of a bill or draft countermands payment, he thereby dispenses with presentment and notice of dishonor to himself. So if he informs the payee that he has withdrawn the funds against which the bill is drawn": 3 Randolph on Commercial Paper, sec. 1385; 2 Daniel on Negotiable Instruments, secs. 1105, 1147; Byles on Bills, 286, 298; *Jacks v. Darwin*, 3 E. D. Smith, 558.

This instruction not to pay, by which the drawer brought dishonor on his own paper, was equally a good excuse for failure to protest the bill; the rule being that, generally, whatever will in law excuse or amount to a waiver of notice of dishonor will equally excuse protest: 3 Randolph on Commercial Paper, secs. 1148, 1161. In such cases, the drawer, being the real debtor, and having knowledge of the fact in advance that pay-

ment will be refused by the drawee by reason of his countermand, can suffer no injury from the alleged negligence of the holder: *Campbell v. Webster*, 2 Com. B. 258.

The instructions of the court as to the set-off were correct. The bill was commercial paper, and being negotiated for value before maturity, was not subject to set-off or recoupment by the express provisions of the statute: Code 1886, sec. 2684; *Bank v. Poelnitz*, 61 Ala. 147. In any event, unless the defendant, Manning, was the owner of the cross-demands prior to the indorsement of the bill of exchange to the plaintiff, and this fact was known to the plaintiff before he acquired title to the bill, the set-off would not be available in an action on the bill, as in the present suit. The note and account claimed by the defendant as a set-off were the property of Jordan, Manning, & Co., a partnership of which defendant was a member. They were due by La Fayette Maroney, the payee and indorser of the bill, not by the defendant. As against such payee, they were not a legal set-off at the time of the indorsement, for want of mutuality: *Cannon v. Lindsey*, 85 Id. 198; 7 Am. St. Rep. 38, and cases there cited. And admitting that a partnership demand against the plaintiff in an action may, by consent of all the partners, be set off against a demand by the plaintiff against an individual partner, that principle can have no application here, because it does not appear that there was any consent of the partners to such use of their claim before the assignment of it to defendant, and that the plaintiff knew of such consent, even if that would avail. The consent given at the trial cannot relate back to the date of the assignment so as to make the set-off good against the assignor; and unless it was good against him, it cannot be so against the defendant, not being his debt, and the paper sued on being governed by the commercial law: *Jones v. Blair*, 57 Ala. 457; Code, secs. 1765, 2684; *McKensie v. Hunt*, 32 Ala. 494.

The charge given by the court recognized these principles, while the instructions refused, on request of the defendant, either ignored, or were in direct conflict with them.

The rulings of the court are free from error, and the judgment is affirmed.

HARMLESS ERROR. — For instances of errors which work no injury, and are harmless, see *Columbus etc. R'y Co. v. Bridges*, 86 Ala. 448; 11 Am. St. Rep. 58, and note 64. Sustaining a demurrer to a special plea is harmless, where, under general issue, appellant had the full benefit of the matters alleged in such special plea: *Jones v. State Bank*, 34 Ill. 313; 85 Am. Dec. 306.

SET-OFF — PARTNERSHIP. — In an action on partnership demand, whether brought in the name of the partnership or their assignee, defendant cannot set off against the partnership demand an individual debt due him from one of the partners: *Common v. Lindsey*, 85 Ala. 196; 7 Am. St. Rep. 38, and note 41. As to the nature and extent of a counterclaim generally, see extended note to *Woodruff v. Garner*, 89 Am. Dec. 482-492.

WOODSTOCK IRON CO. v. FULLENWIDER.

[57 ALABAMA, 564.]

ADVERSE POSSESSION AS BETWEEN HEIRS AND TENANT FOR LIFE. — Possession of lands by widow who is tenant for life is not adverse or hostile to the heirs, and if she purchases the reversionary estate at a sale of the lands made by the administrator, the heirs cannot assail her title at law before her death, although the sale of the reversionary interest was void.

HEIRS OF DECEDENTS — ESTOPPEL AS AGAINST HEIRS TO DENY VALIDITY OF LAND SALE. — Where land of a decedent is sold by the probate court for the payment of debts, or for distribution, and the purchase-money is applied by the administrator to the payment of the decedent's debts, or is distributed to the heirs, although the sale may have been so far void as to convey no title at law, the purchaser nevertheless acquires an equitable title to the lands, which will be recognized in a court of equity, and he may compel the heirs to elect a ratification or rescission of the contract of purchase. They are estopped to deny the validity of the sale, and at the same time enjoy the benefits derived from the appropriation of the purchase-money, and this principle applies to minors as well as adults.

DECISIONS RECOGNIZING DOCTRINE OF PRESUMPTION BY PRESCRIPTION BASED ON LAPSE OF TWENTY YEARS OF TIME are founded upon the principle of some laches on the part of one who, having the right and capacity to sue either at law or in equity, neglects or omits to do so for such period of twenty years. For the repose of society, it is presumed that the right, if it existed, has in some manner been lost by reason of such act of acquiescence, based on some omission or neglect.

CLOUD ON TITLE — LACHES. — Where there is capacity to sue in court of equity, so as to sweep away a cloud on the plaintiff's title, and, by an offer to do equity, to have the equitable title of the defendant, acquired at a void sale, divested out of him by a decree of a court of equity, a failure to exercise this right for over twenty years is such laches as authorizes the inference that the right to do so is barred in some one of the modes in which that result may be effected.

ACTION by Fanny Fullenwider and others, heirs at law of Samuel Hudson, deceased, against the Woodstock Iron Company and the Anniston City Land Company, to recover the possession of a certain tract of land owned by said Hudson at the time of his death. The case was submitted to the decision of the court, and a judgment was rendered for the plaintiffs. Other facts appear in the opinion.

Knox and Bowie, Caldwell and Johnston, Cassady and Blackwell, and Brothers, Willett, and Willett, for the appellants.

Kelly and Smith, contra.

SOMERVILLE, J. The suit is one of ejectment under the statute, brought by the appellees as the heirs at law of Samuel Hudson, deceased, and was commenced on June 28, 1887.

It is shown that the widow of Hudson owned a life estate in the lands, based on her allotted right of dower; and that she purchased the reversionary estate at a sale of the lands made by the administrator of Hudson for the payment of the decedent's debts on March 20, 1866, or more than twenty years before the commencement of this action. She received a deed from the administrator, paid the purchase-money to him, and he used the money in the payment of the debts of the estate. The defendants claim title through the widow, who did not die until June 25, 1879, or less than ten years before suit brought. The possession of the defendants, and those under whom they claim, has been continuous, exclusive, open, and under claim of ownership, since the date of the administrator's sale, or for more than twenty years.

The whole case of the plaintiffs is based upon the contention that the proceedings in the probate court for the sale of the reversionary interest in the lands owned by the decedent's estate were void, and conveyed no title to the purchaser. The reasons assigned for this conclusion are, because minors were interested in the estate, and no depositions are shown to have been taken, as in chancery cases, proving the necessity of the sale, and because there was no order of the probate court authorizing the administrator to make a deed to the purchaser, besides some other grounds, which need not be named: *Bland v. Bowie*, 53 Ala. 158; *Satcher v. Satcher*, 41 Id. 26; 91 Am. Dec. 498; *Doe v. Hardy*, 52 Ala. 291.

It is contended further by the plaintiffs (or appellees) that under the authority of *Pickett v. Pope*, 74 Ala. 122, and other decisions of this court, neither the possession of the life tenant, nor of the defendants as purchasers holding under her, could be adverse to the heirs as reversioners, until the death of the life tenant, which occurred about eight years before the commencement of the action. For this reason, it is said, there was no right residing in the plaintiffs to sue at law; and hence there was no laches or neglect on their part which could be the foundation of any presumptions hostile to their title.

The defendants, who are appellants in this court, contend, on the contrary, that all irregularities of sale and defects of title under the admitted facts of the case are cured by the presumptions arising from the lapse of twenty years, under the broad doctrine of prescription now so thoroughly established in this state.

The plaintiffs certainly had no right to sue in ejectment for these lands before the death of the widow, who was tenant for life; her possession, so far at least as concerns the legal title in the reversion, not being adverse or hostile to the heirs during the continuance of such particular estate: *Pickett v. Pope*, 74 Ala. 122; *McCorry v. King's Heirs*, 3 Humph. 267; 39 Am. Dec. 165; Tiedeman on Real Property, sec. 715. The question is, whether any presumption will arise from the lapse of twenty years, sufficient to perfect the title of defendants, in view of the incapacity of plaintiffs to sue at law. In considering this question, we shall regard the contention of the appellees as well taken, so far as to assume that the sale of the administrator conferred no legal title to the reversion on the widow as purchaser under the probate proceedings in March, 1866.

Regarding the proceedings in the probate court as void at law for the reasons stated, what, we may inquire, were the equitable rights, if any, acquired under it by the purchaser? This question has been fully settled by our past decisions. Where land of a decedent is sold by the probate court for the payment of debts, or for distribution, and the proceeding is void for want of jurisdiction, or otherwise, and the purchase-money, being paid to the administrator, is applied by him to the payment of the debts of the decedent's estate, or is distributed to the heirs, while the sale is so far void as to convey no title at law, the purchaser nevertheless acquires an equitable title to the lands, which will be recognized in a court of equity. And he may resort to a court of equity to compel the heirs or devisees to elect a ratification or rescission of the contract of purchase. It is deemed unconscionable that the heirs or devisees should reap the fruits of the purchaser's payment of money appropriated to the discharge of debts, which were a charge on the lands, and at the same time recover the lands. They are estopped to deny the validity of the sale, and at the same time enjoy the benefits derived from the appropriation of the purchase-money. And this principle applies to minors as well as adults: *Bland v. Bowie*, 53 Ala. 152; *Bell v. Craig*,

52 Id. 215; *Robertson v. Bradford*, 73 Id. 116; see also *Ganey v. Sikes*, 76 Id. 421.

All of our decisions, it is true, recognizing the doctrine of presumption by prescription based on the lapse of twenty years of time, are founded upon the principle of some laches on the part of one who, having the right and capacity to sue either at law or in equity, neglects or omits to do so for such period of twenty years. For the repose of society, it is presumed that the right, if it existed, has in some manner been lost by reason of such act of acquiescence based on some omission or neglect: *Long v. Parmer*, 81 Ala. 384, and cases cited on page 388; *Bozeman v. Bozeman*, 82 Id. 389; *McCorry v. King's Heirs*, 8 Humph. 267; 39 Am. Dec. 165. In the following cases, cited on the brief of appellants' counsel, where life tenants had purchased the reversion under sales which conferred no legal title to such reversionary interest, important presumptions were allowed to prevail under the operation of twenty years' lapse of time, accompanied by possession and claim of ownership, involving the payment of the purchase-money, the execution of conveyances, and the presumed regularity in the execution of powers: *Matthews v. McDade*, 72 Ala. 377; *Gosson v. Ladd*, 77 Id. 223; *Kelly v. Hancock*, 75 Id. 229.

The plaintiffs in the present case, as reversioners, had no right, as we have said, to sue at law. But they had a right to go into a court of equity to remove the cloud from their title created by the probate court proceedings. This cloud consisted of the administrator's deed, and other record evidence of a sale, under the operation of which the purchaser had acquired an equitable title. Under an adverse possession, such a title would become perfect in ten years after the death of the life tenant, and extrinsic evidence would be necessary to show whether the holder of such particular estate was living or dead. The deed and other proceedings, therefore, were of a character to be used to injuriously affect the complainants' title, and operated, moreover, to impair the market value of the reversion, and to prevent its sale by the owners in the event they desired to dispose of it. And while one having the legal title to land, with the right of possession, would be compelled first to recover possession by ejectment before invoking this jurisdiction of equity to quiet it, yet the rule is different where the complainants' title is equitable, or where, like a reversioner or remainderman, he is not entitled to possession by reason of the existence of a life or particular estate. In the

latter class of cases, the complainant may at once resort to equity to have the objectionable proceedings vacated as a cloud on his title, especially when it is necessary to do some act of equity as a condition precedent to its exercise. That act, in this case, would be to tender to the purchaser the amount bid at the sale, — whether with or without interest, we need not decide. That a reversioner or remainderman may file such a bill on the same principle upon which he is permitted to redeem from a mortgage sale, we consider to be clear, both on principle and authority, his remedy at law being entirely inadequate. As observed in a recent case holding this view: "A remainder [or reversion] is a present right, though the enjoyment is future, and the owner may desire to dispose of it, or in some way to make it available to his needs; and he is entitled to have it relieved from a cloud impairing its value, and perhaps rendering it wholly unavailable": *Aiken v. Suttle*, 4 Lea, 105, and cases cited on page 110; 3 Pomeroy's Eq. Jur., secs. 1220, 1398, 1399, note 4; 1 High on Injunctions, 2d ed., sec. 330; 3 Wait's Actions and Defenses, 190, 191.

Here, then, was the capacity to sue in a court of equity, so as to sweep away a cloud on the title of the plaintiffs, and by an offer to do equity, to have the equitable title of the defendants, acquired at the void sale, divested out of them by decree of a court of chancery. A failure to exercise this right for over twenty years is such laches as authorizes the inference that the right to do so is barred in any one of the modes in which that result may be effected. If the only existing right of action on the plaintiffs' part were at law, — if his only laches, or slumbering on his rights, consisted in his failure to sue at law, — then, as we have often said, "the only fact open to inquiry in such cases would be the character of defendants' possession, either in its original acquisition or in its continued use, as being, on the one hand, permissive and in subordination, or on the other, hostile and adverse": *Long v. Parmer*, 81 Ala. 384, and cases cited on page 388. But the laches here imputed to the plaintiffs is the fact of having allowed the probate court proceedings to remain unassailed for over twenty years, — proceedings under which, though void at law, a good equitable title to the reversion had been acquired, accompanied with possession and claim of ownership on the part of the purchaser and her subvendees, during the whole of this long period.

The fair legal presumption arising from this state of facts, in our opinion, is, that the purchaser, or those claiming title

under her, have filed a bill in equity compelling the heirs of Hudson to convey to them the legal title, or else that a voluntary conveyance of such title has been made by such heirs, thereby converting the equitable into a legal title: *Bland v. Bowie*, 53 Ala. 152; *Bell v. Craig*, 52 Id. 215.

The special finding of the circuit court on the facts was made under the provisions of the statute: Code 1886, secs. 2744, 2745. This statute makes it our duty to examine and determine whether the facts are sufficient to support the judgment, which was for the plaintiffs. It follows from the views above expressed that they are not. The court erred in rendering judgment on the facts for the plaintiffs. That judgment will be reversed, and a judgment will be rendered in this court for the defendants.

Reversed and rendered.

The precise ground upon which the court proceeded in the principal case is not easy to comprehend. The action was ejectment. The plaintiffs were conceded to hold the legal title. The possession of the defendants and those under whom they claimed commenced when the plaintiffs were reversioners not entitled to the possession; the plaintiffs could not have maintained any action to recover possession until the death of their mother, the tenant for life, terminated her estate, and for the first time vested them with a right of possession; they brought their action within the time allowed by law after their cause of action accrued; and yet were defeated by what appears to have been substantially the statute of limitations.

The defendants held a cloud upon the plaintiffs' title which might have been removed by a court of equity in an action on the complaint of the plaintiffs. A cloud upon the title is that which appears to be, but in law and in fact is not, title. The only harm which elsewhere results from such a cloud is, that the party whose title it clouds may find his title unmarketable, and at some distant time may have difficulty in producing the evidence requisite to rebut it, or to show its true nature. But if he chooses to suffer these inconveniences, we never before heard that his real title became worthless, and his adversaries' apparent title became real. Yet in Alabama, as appears from the principal case, the failure to remove a cloud upon a title may raise the presumption that it has ceased to be a cloud, and has become fortified by the true title. The court did not, however, take the position that, in ordinary circumstances, the statute of limitations could run against a reversioner who brought his action to recover possession within the period specified by statute after he became entitled to such possession. That position would have been unquestionably untenable: *Orthwein v. Thomas*, 127 Ill. 554; 11 Am. St. Rep. 159; *Lamar v. Pearre*, 82 Ga. 354; 14 Am. St. Rep.

No presumption can justly be indulged from the failure to bring an action to remove a cloud upon a title, because, as a cloud is not a title, it may continue to the end of the world without becoming anything substantial. It might as well be decided that one who, being libeled, fails to prosecute an action to vindicate his good character, thereby estops himself from ever after claiming to be an honest man, as that one who fails to remove a cloud

upon his title creates a presumption that he has relinquished his true title to the holder of the cloud.

ADVERSE POSSESSION. — The statute of limitations does not run against a reversioner or remainderman during the existence of the particular estate: *McCurry v. King*, 3 *Humph.* 267; 39 *Am. Dec.* 166, and note 175; *Kellar v. Stanley*, 86 *Ky.* 240. A widow in possession of the deceased husband's lands does not hold adversely to the heirs: *Page v. Branch*, 97 *N. C.* 97; 2 *Am. St. Rep.* 281; and a father does not hold adversely to his children, where he occupies lands belonging to his deceased wife as a tenant by curtesy: *Orthwein v. Thomas*, 127 *Ill.* 554; 11 *Am. St. Rep.* 159, and note 173. If realty is covered by assigned dower, possession cannot be adverse to, nor can the statute of limitations run against, the remainderman until the termination of the dower estate: *Burns v. Headrick*, 85 *Tenn.* 102. Possession cannot be adverse so as to start the operation of the statute of limitations until the title to land has emanated from the United States: *Cummings v. Powell*, 97 *Mo.* 524.

LACHES. — A delay of twenty years in maintaining an action to set aside a deed for fraud is such laches as is fatal to plaintiff: *Wright v. Fisher*, 65 *Mich.* 279; 8 *Am. St. Rep.* 886, and note; compare note to *Bell v. Hudson*, 2 *Am. St. Rep.* 795-808, as to the subject of laches generally. Laches of complainant will deprive him of relief in equity: *Powers's Appeal*, 125 *Pa. St.* 175; 11 *Am. St. Rep.* 882, and cases collected in note 885; *Orthwein v. Thomas*, 127 *Ill.* 554; 11 *Am. St. Rep.* 159.

ESTOPPEL — **WHAT CONSTITUTES, AND INSTANCES OF:** See *Cook v. Walley*, 117 *Ind.* 9; 10 *Am. St. Rep.* 17, and note 21, 22. Heirs are not estopped to avoid a voidable judicial sale merely because they received the benefit of the proceeds, especially where they are minors: *Valls v. Fleming*, 19 *Mo.* 454; 61 *Am. Dec.* 566; *Schnell v. City of Chicago*, 38 *Ill.* 382; 87 *Am. Dec.* 304, and note 314.

COX v. HOLCOMB.

[57 ALABAMA, 589.]

HOMESTEAD — **EQUITABLE RELIEF AGAINST DEFECTIVE CONVEYANCE OF, DENIED.** — The officer's certificate of the wife's acknowledgment to a conveyance of the homestead by husband and wife is substantially defective in omitting to certify her examination and acknowledgment in the mode required by the statute, and the conveyance will not be reformed in equity on the ground that the examination and acknowledgment were in fact properly made, but not shown by the certificate from ignorance or mistake on the part of the officer; nor, in such case, will the conveyance be specifically enforced as an executory contract to convey.

HOMESTEAD, ALIENATION OF — **ACKNOWLEDGMENT.** — Officer's certificate of acknowledgment, in substantial compliance with the statutory form, is an essential to a valid alienation of the homestead as the examination and acknowledgment of the wife required by the statute; and a substantial compliance must affirmatively appear from the certificate itself, which is the sole and exclusive evidence of the voluntary signature and assent of the wife. Parol evidence is inadmissible to supply deficiencies.

BILL filed by Mrs. Cox against one Holcomb, as administrator of the estate of Robert Bridges, deceased, and Mrs. Frances Bridges, widow of said Robert Bridges, and the mother of the complainant; and it was sought to obtain relief against a defective conveyance executed by said Bridges and wife to the complainant. Other facts appear in the opinion. A demurrer to the bill for want of equity was sustained, and the complainant assigned error.

E. D. Willett and J. C. Johnston, for the appellant.

D. C. Hodo, contra.

CLOPTON, J. On October 22, 1878, Robert Bridges and his wife, Frances Bridges, joined in a conveyance of real estate to appellant, upon a recited valuable consideration. The land conveyed included the homestead of the grantor. The officer's certificate of the wife's acknowledgment does not show a substantial compliance with the form prescribed by the statute in such cases; it omits to affirm a privy examination of the wife, and to exclude fear, constraint, or threats on the part of the husband. Appellant seeks by his bill to vacate and annul proceedings in the probate court, by which the homestead exemption was allotted to Frances Bridges, after the death of her husband, and to enjoin the enforcement of a judgment recovered by her against appellant for the possession of the land exempted. The ground of relief is, that the officer before whom the wife's acknowledgment was made omitted to certify her examination and acknowledgment in the manner required by the statute, from mistake or ignorance of the law, though, as the bill alleges, she was in fact examined separate and apart from her husband, and acknowledged that she signed the deed of her own free will and accord, and without fear, constraints, or threats on his part. The bill prays that complainant be allowed to prove that Frances Bridges was so examined, and made such acknowledgment, so as to constitute the deed a valid and legal conveyance; and failing in this, that the conveyance may be enforced as an executory contract.

In *Gardner v. Moore*, 75 Ala. 394, 51 Am. Rep. 454, it was held that where a mortgage of a homestead was executed by a married man and his wife, in strict conformity with the statute, a court of equity will assume jurisdiction to correct a misdescription in land conveyed and intended to be conveyed.

It is not claimed that there is any mistake in the description of the subject-matter, or terms of the conveyance. On the case made by the bill, the jurisdiction of the court is invoked to aid a defective certificate of acknowledgment, or to compel the specific performance of an agreement to convey by a married woman. While no case has been heretofore presented in which the wife was in fact examined separate and apart from her husband touching her signature to an alienation of the homestead, and made the statutory acknowledgment of her voluntary signature and assent, and the officer before whom the acknowledgment was made omitted to certify in substantial compliance with the statute, the principles which underlie the case, and are decisive of the question involved, should be regarded as well settled. An alienation of the homestead by a married man, not executed by the wife in the manner prescribed by the statute, has been uniformly held to be a nullity, —inoperative to confer any rights. Such alienation does not possess the force and effect of an imperfectly executed conveyance. To give it operation, there must be a subsequent acknowledgment by the wife, properly certified, made voluntarily, and with intent to cure the defect: *Balkum v. Wood*, 58 Ala. 642. The constitution and statute have reference to some mode of alienation by which the title passes *in presenti*. They do not contemplate instruments which can be regarded only as agreements to convey. From the performance of an executory contract to alienate the homestead which is a nullity because of the incapacity of the wife to make such agreement, she may withhold her signature and assent, and the court is powerless to compel performance. It is well settled by our decisions that the conveyance of the homestead by the husband, though signed by the wife, if not executed in the manner essential to its validity, will not be enforced against her as a contract to convey: *Jenkins v. Harrison*, 66 Id. 345; *Blythe v. Dargin*, 68 Id. 370; *Gardner v. Moore*, *supra*.

By the statute it is essential to a valid alienation of the homestead by a married man that the voluntary signature and assent of the wife shall be shown by her privy examination before an officer authorized to take acknowledgments, and by the certificate of such officer, in the form prescribed by the statute, upon or attached to the deed: Code 1886, sec. 2508; *Scott v. Simons*, 70 Ala. 354. The power of the wife to consent to the alienation is derived from the statute. There can be no question that if no sufficient examination and acknowl-

edgment have been made, a court of equity will not compel the wife to correct the defective execution. When an order for re-execution is necessary, and the reformation only operates as a reconveyance, the court will not undertake to reform it. The wife's signature and assent must be voluntary, under the constitution and statute. The omission of the statutory requirement, essential to a valid execution of the deed of a married woman, cannot be supplied by the compulsory power of the court: *Gebb v. Rose*, 40 Md. 387; *Russell v. Rumsey*, 35 Ill. 362.

We have been referred by counsel to decisions in other states which uphold proceedings to correct defective official certificates in analogous cases. An examination shows that the decisions are rested on local statutes authorizing such proceedings; and some of the cases concede that, in the absence of statutory authority, the court would not assume to correct them: *Johnson v. Taylor*, 70 Tex. 360; *Hutchinson v. Ainsworth*, 63 Cal. 286; *Kellenbrock v. Cracraft*, 36 Ohio St. 584. As we have said, the officer's certificate of acknowledgment, in substantial compliance with the statutory form, is as essential to a valid alienation of the homestead as the examination and acknowledgment of the wife required by the statute. A substantial compliance must affirmatively appear from the certificate itself, which is the sole and exclusive evidence of the voluntary signature and assent of the wife. Parol evidence is inadmissible to supply deficiencies.

It is manifest from the frame and prayer of the bill that its purpose is to aid or supply the defective execution of the officer's certificate attached to the deed to complainant. The power of the officer to make such certificate is also statutory. Though a court of equity will relieve against the defective execution of a power created by a party, it is well settled that, with few exceptions, it cannot relieve against the defective execution of a power created by statute, nor supply any of the formalities requisite to its due execution: *McBryde v. Wilkinson*, 29 Ala. 662. The officer taking the acknowledgment may, during his continuance in office, voluntarily correct his certificate, or make a new one conforming to the statute, if the facts warrant; but a court of equity will not assume to correct or aid the defective execution of such statutory powers. It follows that the bill of complainant is wanting in equity: *Wannall v. Kem*, 51 Mo. 150.

This conclusion to which we are forced may work hardship;

but grantees can avoid such consequences by taking care to see that their conveyances are properly executed.

Affirmed.

MARRIED WOMEN — DEEDS — ACKNOWLEDGMENTS. — As to what mistakes in deeds and acknowledgments thereto, made by married women, can be corrected in equity, see extended note to *Gardner v. Moore*, 51 Am. Rep. 458-462.

MARRIED WOMEN — ACKNOWLEDGMENTS TO DEEDS. — As to the defects in acknowledgments of married women, and what acknowledgments by them are sufficient, see *Bull v. Coe*, 77 Cal. 54; 11 Am. St. Rep. 235, and cases in note 242; *Carlson v. Williams*, 77 Cal. 89; 11 Am. St. Rep. 243, and cases collected in note 244.

MARRIED WOMEN — ACKNOWLEDGMENTS. — Privy Examination. — The certificate of a privy examination of a married woman is valid without the addition of the seal, to the signature, of the officer who makes it: *Lucas v. Larkin*, 85 Tenn. 355. The privy examination of a married woman taken on Sunday does not invalidate her deed: *Id.* Without privy examination, the execution of a promissory note by a married woman stipulating to bind her separate estate, without describing what constitutes such estate, creates a charge, but not a lien, upon her separate estate: *Warren v. Freeman*, 85 Tenn. 513. Before the privy examination of a married woman can be taken to a deed executed by a husband and wife, such deed must first be acknowledged by both the spouses, or its execution by both proven by a subscribing witness: *Wynne v. Small*, 102 N. C. 133. That a privy examination may be sufficient, it is not necessary that the husband go entirely out of the room; for all that is desired is, that the wife shall have full liberty to express to the acknowledging officer her desire in the matter: *Hall v. Castleberry*, 101 Id. 153. The officer's certificate must show that upon examination, without the hearing of the husband, he made the wife acquainted with the contents of the instrument; and making her acquainted with the contents in the presence of her husband, and then procuring her mere acknowledgment when he is not present, is not a sufficient privy examination: *Bollinger v. Manning*, 79 Cal. 7. A certificate of privy examination must show that the married woman both acknowledged the deed and declared that she willingly executed it: *Laidley v. Land Co.*, 30 W. Va. 506; compare *Blair v. Sayre*, 29 Id. 604.

MARRIED WOMEN — ACKNOWLEDGMENTS. — Miscellaneous Instances. — A married woman's acknowledgment taken before an officer, but not signed by him until it has been recorded, and his official term has expired, is not good, and does not make the deed effectual: *Fitzgerald v. Milliken*, 83 Ky. 70. A married woman's acknowledgment is good when taken before a deputy clerk, though merely evidenced by these words: "Acknowledged by Willis C. Woods, this May 5, 1873. (Signed) J. H. Lapsley, D. C. M. C. C.": *Woods v. James*, 87 Ky. 511. The certificate of a married woman's acknowledgment is only *prima facie* evidence of the facts therein stated: *Mays v. Pryce*, 95 Mo. 603; but compare *Cox v. Gill*, 83 Ky. 669, as to the conclusiveness of facts stated in a married woman's acknowledgment when certified by a proper officer.

MARRIED WOMAN'S DEED, TO BE A GOOD CONVEYANCE, must be executed precisely as directed by statute: See *Williams v. Cudd*, 28 S. C. 213; 4 Am. St. Rep. 714, and note 718. A conveyance not properly acknowledged by a married woman is void as her conveyance: *Bollinger v. Manning*, 79 Cal. 7.

LOUISVILLE AND NASHVILLE R. R. Co. v. HALL.

[57 ALABAMA, 708.]

RAILROAD COMPANIES — REQUIREMENTS OF DUTY IN RESPECT TO CONSTRUCTION OF BRIDGES. — When, in crossing a public highway, it becomes necessary for a railroad company to span it with a bridge, it is the duty of the company to place the structure at such an elevation as that trains, with their customary employees, can pass under it unharmed. But where inequality of surface or other hindrance, occurring naturally or in the proper construction or grade of the railroad track, renders such elevation impossible, or would greatly incommode the public in the use of the bridge, or greatly increase the expense to the company, it may be so constructed as to extend below the line of absolute safety; but in no case would it be permissible to so place the bridge that brakemen on top of the train, and while in the discharge of their duties, could not avoid danger by bending or stooping.

RAILROAD COMPANIES — RINGING BELL OR BLOWING WHISTLE AT CROSSING. — The design of the statutory requirement that the conductor or engineer shall ring the bell or blow the locomotive-whistle, on approaching a public road crossing, is to warn and protect persons who are about to cross the track of the road; and it has no application to the case of a brakeman suing for personal injuries, caused by his being struck by the timbers of a bridge overhead while on top of one of the cars, in the discharge of his duty.

RAILROAD COMPANIES — DUTY TO PROVIDE WARNING SIGNALS FOR PROTECTION OF EMPLOYEES. — The question of duty and liability of a railroad company, in respect to the use of appliances to warn employees when approaching a public road crossing spanned by a bridge overhead, is to be determined by utility, and the usage and custom of well-regulated railroads. If the appliances are useless and hurtful, it cannot be negligence to reject them, and if many well-regulated railroads abstain from their use, the failure to use them is not of itself negligence; and their use by a majority of railroads does not necessarily require all railroads to adopt them, nor impute negligence for failure to do so.

RAILROAD COMPANIES — NOTICE TO BRAKEMAN OF DANGER FROM LOW BRIDGE — CONTRIBUTORY NEGLIGENCE. — When a brakeman employed by a railroad company is placed on a train running on a road with which he is not familiar, and such train has to pass under a low bridge or bridges, which, though not high enough to allow him to pass in an erect position on top of a car, is yet high enough to meet legal requirements, it is the duty of the company to warn or notify him of the danger he is to encounter, and failure to do so is negligence, for which the company would be liable. But if he has been sufficiently warned or notified of the danger, and from inattention, indifference, absent-mindedness, or forgetfulness, he fails to inform himself, or to take the necessary steps to avoid the injury, he is guilty of such contributory negligence as will defeat a recovery.

PLEADING — SUFFICIENCY OF COMPLAINT. — The complaint in an action by a brakeman against a railroad company to recover for personal injuries caused by being struck by a bridge overhead across a public road, while on the top of a car in the discharge of his duties, is insufficient, if it fails to aver that the bridge in question was erected or maintained by the railroad company.

PLEADING AND PRACTICE — **SUSTAINING DEMURRER TO SPECIAL PLEA, IF KNOWN AT ALL**, is error without injury, where, as the record shows, the defendant had the benefit of the same defense under another special plea.

EVIDENCE — **GENERAL NOTORIETY IS GENERALLY ADMISSIBLE EVIDENCE** as tending to prove notice of a fact, when such notice is a material inquiry; but it is never competent evidence to prove the fact itself, which must be shown by other testimony.

WITNESSES — **EXPERT TESTIMONY**. — Railroad superintendent who has been employed on railroads for twenty years, and who has served as fireman, brakeman, baggage-master, yard-master, and train-master, may give his opinion as an expert as to the merits or demerits of "whipping-straes" as cautionary signals to brakemen of the approach of the train to low bridges, and whether or not they were generally in use on railroads regarded as well regulated; but he could not give his opinion as to the prudent management of the defendant's railroad.

PLEADING — **EVIDENCE** — **CONTRIBUTORY NEGLIGENCE, WHEN PLEADED ALONE, IS AN ADMISSION** of negligence on the part of the defendant; but when it is interposed with the plea of not guilty, the effect of the double defense is, that all negligence on the part of the defendant is denied, and the burden of proof is thrown on the plaintiff.

TRIAL — **REQUISITES OF CHARGE TO JURY**. — Charges to juries should, if possible, be plain, simple, and easily understood, free from obscurity, involvement, ambiguity, metaphysical intricacy, or tendency to mislead; and a charge obnoxious to any of these objections should be refused, although on dissection it may assert a correct legal proposition. The office and purpose of a charge is to enlighten the jury, and it should go no further than to state plain propositions of law, applicable to the tendency or varying tendencies of the evidence.

ACTION by William G. Hall, a minor, suing by his next friend, against the Louisville and Nashville Railroad Company, to recover damages for personal injuries sustained by him while in the employ of the defendant as a brakeman. The plaintiff, while in the discharge of his duties as brakeman on the top of a freight train, was struck by the timbers of an overhead bridge, which spanned a public road near Greenville, Alabama, and was knocked to the ground, and was so seriously injured that it became necessary to amputate one of his feet. Other facts appear in the opinion. The verdict and judgment were for the plaintiff, and the defendant assigned error.

Gaylord B. Clark, and F. B. Clark, Jr., for the appellants.

R. Inge Smith, and Greg. L. & H. T. Smith, contra.

STONE, C. J. We lay down the following legal propositions: When, in crossing a public highway, it becomes necessary for a railroad company to span it with a bridge, it is its duty, if reasonably practicable, to place the structure at such an ele-

vation as that trains with their customary employees can pass under it unharmed: *Smoot v. M. & M. R'y Co.*, 67 Ala. 17; *Louisville etc. R. R. Co. v. Allen*, 78 Id. 501; *Georgia Pac. R. R. v. Propst*, 88 Id. 518; *H. & T. R'y Co. v. Oram*, 49 Tex. 341; *Wilson v. Louisville etc. R. R. Co.*, 85 Ala. 269. This is not an absolute, unbending requirement, but it will yield to a reasonable extent to circumstances, as many other natural and social rights must yield to other rights and interests, which duty requires to be conserved. If inequality of surface, or other hindrance, occurring naturally or in the proper construction or grade of the railroad track, render such elevation impossible, or greatly incommode the public in the use of the bridge, or greatly or unduly increase the expense to the railroad company, then one inconvenience must yield somewhat to the other. In such case, the bridge may be so constructed as to extend below the line of absolute safety. A bridge constructed and maintained with proper regard to these conditions, would not, without more, be negligence: *Patterson on Railway Acc. Law*, sec. 285; 2 *Rorer on Railroads*, 1217; *Wells v. B., C. R., & N. R. R. Co.*, 2 Am. & Eng. R'y Cas. 243; *Rains v. St. L., I. M., & S. R'y Co.*, 5 Id. 610; *Clark v. Richmond etc. R. R. Co.*, 18 Id. 78; *Baylor v. Del., L., & W. R. R. Co.*, 40 N. J. L. 28; 29 Am. Rep. 208; *Illick v. Flint & P. M. R. R. Co.*, 67 Mich. 632. In no case, however, would it be permissible to so place the bridge that brakemen on top of the train, in discharge of their duties, could not avoid danger by bending or stooping. A bridge, such as here last supposed, would be gross negligence, and *per se* a nuisance: *Illinois Cent. R. R. Co. v. Welch*, 52 Ill. 183; 4 Am. Rep. 598; *Chicago etc. R. R. Co. v. Gregory*, 58 Ill. 272; *Chicago etc. R. R. Co. v. Russell*, 91 Id. 298; 88 Am. Rep. 54. If such bridge is so constructed as to extend below the line of absolute safety, then other duties rest on the railroad company.

The bridge in question was part and parcel of the public highway. The record affords evidence that on the trial below the question was considered, whether it was the duty of the defendant corporation "to blow the whistle or ring the bell at least one fourth of a mile before reaching [a] public road crossing, . . . and continue to blow the whistle or ring the bell at short intervals until the train passed the crossing": Code 1886, sec. 1144. That statute has nothing to do with this case. Its design was to warn and protect persons who, at a public crossing, pass across and directly on the track, and

who would be in danger of being struck and run over by an approaching train: *Alabama etc. R. R. Co. v. Hawk*, 72 Ala. 112; 47 Am. Rep. 403; *Nashville etc. R. R. Co. v. Hembree*, 85 Ala. 481.

Other questions were raised in the trial court touching the duty of railroad companies to provide or furnish warning signals. Among these may be mentioned "whipping-straps," and placing a cautionary light on the bridge. Considered abstractly, these are scarcely legal questions. Utility, and the usage and custom of well-regulated railroads, must determine the question of duty in this regard. If useless or hurtful, it cannot be negligence to reject them. So, at most, if many well-regulated railroads abstain from their use, this absolves from all duty to resort to them. By the word "many," we intend to be understood as meaning not a mere excess above the adjective "few." "Many" denotes multitude; and while it is not the synonym of the word "majority," our meaning is, that if a relatively large number, as compared with the whole number, abstain from their use, then to omit them is not of itself negligence. As to appliances,—particularly new inventions, or changes claimed to be improvements,—all railroads are not required to conform to one standard. Allowance is and must be made for diversity of opinion; and their use by a majority of roads does not necessarily require all railroads to adopt them: *Louisville etc. R. R. Co. v. Allen*, 78 Ala. 494; *Ga. Pac. R. R. Co. v. Propst*, 83 Id. 518; *Wilson v. Louisville etc. R. R. Co.*, 85 Id. 269; *Baldwin v. C., R. I., & P. B. R. R. Co.*, 50 Iowa, 680.

When a brakeman is placed on a freight train, running on a road with which he is not familiar, and such train has to pass under a low bridge or bridges, the law, which simply voices the sentiment of humanity, requires that notice be given him of the danger he is to encounter. This notice must be reasonable; that is, he must be reasonably instructed, so as to put him on the look-out, and on inquiry and observation, that he may inform himself of the locality of the places of danger. The whole duty is not on the railroad company. The employee must give heed to the notice and instructions given him, and must employ his senses, his reasoning faculties, and his attention, alike for his own safety and the welfare of the road. If he has not been sufficiently warned or notified to enable him by proper attention and diligence to learn where the points of danger are, then this would be negligence, for

which the railroad company would be liable. On the other hand, if he has been sufficiently warned or notified, and from inattention, indifference, absent-mindedness, or forgetfulness, he fails to inform himself, or fails to take the necessary steps to avoid the injury, this is negligence, and he should not recover: *Sullivan v. India Mfg. Co.*, 113 Mass. 396; *Baltimore etc. R. R. Co. v. Stricker*, 51 Md. 47; 34 Am. Rep. 291; *Dorsey v. P. & C. Con. Co.*, 42 Wis. 583; *Louisville etc. R'y Co. v. Wright*, 115 Ind. 378; 7 Am. St. Rep. 432; *St. Louis etc. R. R. Co. v. Irwin*, 37 Kan. 701; 1 Am. St. Rep. 266; *Wilson v. Louisville etc. R. R. Co.*, 85 Ala. 269.

It is not denied, in this case, that the space between the taller freight-cars used on defendant's road and the timbers of the bridge would not permit a man of ordinary height, standing erect on the top of the cars, to pass under the bridge without being struck by it. The two principal, leading inquiries, then are: 1. Was the railroad company, under the rules above declared, justified in maintaining its bridge at the elevation shown in the testimony? If it was, plaintiff was not, merely on that ground, entitled to recover, for he had no cause of action. If the railroad company, under said rules, has failed to establish its right to maintain the bridge at the elevation proved, then negligence is shown, and, unrebutted, authorized a recovery by plaintiff. That *prima facie* right would be rebutted if plaintiff was guilty of proximate, contributory negligence. 2. If, under the rules we have stated, the plaintiff was sufficiently notified or warned, and from inattention, indifference, absent-mindedness, or forgetfulness, he failed to inform himself, or failed to take the necessary steps to avoid the injury, this was proximate, contributory negligence, and is also a complete answer to the action. He must avail himself of the instructions given him, or furnished for his use; and taking into the account the surroundings and perils attendant upon the nature of the service he enters upon, he must bestow such care, watchfulness, and caution as ordinarily prudent men would usually exercise in reference to their own safety under like circumstances. There are perils in the very nature of such service against which prudence cannot always guard. Of these the employee takes the risk. He is guilty of contributory negligence if, in his care, diligence, and watchfulness, he falls below the standard stated above: 3 Wood's Railway Law, 1481; *Wabash R'y Co. v. Elliott*, 98 Ill. 481; 4 Am. & Eng. R'y Cas. 651; *Clark v. St. P. &*

S. City R. R. Co., 2 Id. 240; *Wells v. B., C. R., & N. R. R. Co.*, 2 Id. 243; *Pittsburgh etc. R. R. Co. v. Sentmeyer*, 92 Pa. St. 276; 5 Am. & Eng. R'y Cas. 508; *St. L., I. M., & S. R'y Co. v. Rains*, 71 Mo. 164; 5 Am. & Eng. R'y Cas. 610; *Clark v. Richmond etc. R. R. Co.*, 18 Id. 78; *Gibson v. Erie R'y Co.*, 63 N. Y. 449; 20 Am. Dec. 552; *Laffin v. Buffalo etc. R. R. Co.*, 106 N. Y. 136; 60 Am. Rep. 433; *Devitt v. Pac. R. R. Co.*, 50 Mo. 302; 3 Am. R'y Cas. 533; *Owen v. N. Y. Cent. R. R. Co.*, 1 Lans. 108; *Atlanta etc. R. R. Co. v. Webb*, 61 Ga. 586; *Atlanta etc. R. R. v. Johnson*, 66 Id. 259; *Indianapolis etc. R. R. Co. v. Flanigan*, 77 Ill. 365; *Toledo etc. R'y Co. v. Black*, 88 Id. 112; *Gould v. Chicago etc. R'y Co.*, 66 Iowa, 590. And evidence that the appliance has been long used with safety is competent on the inquiry of contributory negligence: *Allen v. B., C. R., & N. R'y Co.*, 5 Am. & Eng. R'y Cas. 620; *Alabama etc. R. R. Co. v. Arnold*, 84 Ala. 159; 5 Am. St. Rep. 354; *Laffin v. Buffalo etc. R. R. Co.*, 106 N. Y. 136; 60 Am. Rep. 433; *Loftus v. Union Ferry Co.*, 84 N. Y. 455; 88 Am. Rep. 583; *Burke v. Witherbee*, 98 N. Y. 562.

The complaint contains eleven counts, and there were demurrers to each of them. We think the demurrers ought to have been sustained to those numbered eight and nine. Count No. 8 is meager and defective in many particulars. Count No. 9 fails to aver that plaintiff was in the performance of any duty pertinent to his services as brakeman when he was injured. Count 11 is defective, in that there is no duty resting on the engineer, as matter of law, to signal the approach to a low or dangerous overhead structure. Possibly it would be well if the law was so framed as to require notice to be given of such approach by a signal which exposed employees would understand. The grounds of demurrer, in reference to the counts we have declared defective, which should have been sustained, are,—in reference to count 8, assignments 21 and 22; to count 9, assignment No. 23. The trial court sustained the demurrers to counts 10 and 11, and we need not consider them.

A railroad corporation is "authorized to use, or to cross, or to change public roads, when necessary in the building, construction, or maintenance of its roadway or track, but must place the road used, or crossed, or changed, in a condition satisfactory to the authorities," etc.: Code 1886, sec. 1581 (1841). It is manifest that this statute approved March 8, 1876 (Sess. Acts, 257), has reference to public roads in use as

such at the time the road was constructed; or, at least, in case of a bridge, that it should have been erected or maintained by the railroad company. Each of the counts in the complaint is defective in not averring that the bridge in question was erected or maintained by the railroad company. The twenty-eighth ground of demurrer ought to have been sustained. With this exception, each of the first six counts of the complaint is sufficient: *South etc. R. R. Co. v. Thompson*, 62 Ala. 494; *East Tenn. etc. R. R. Co. v. Carloss*, 77 Id. 443; *Hall v. Posey*, 79 Id. 84; *M. & O. R. R. Co. v. Thomas*, 42 Id. 672.

We will not consider the rulings on the demurrer to the third plea. The defendant could and did have, under his second plea, the benefit of all defenses he could have made under the third: 3 Brickell's Digest, 405, sec. 20.

Proof of general notoriety is generally admissible as tending to prove notice of a fact, when such notice is a material inquiry; but it is never competent to prove the fact itself. That must be shown by other testimony. Applied to the present case, it was not competent testimony, on the inquiry whether the bridge in question had ever before been the means of killing a person. Seeing the dead body was no proof that the person had been killed by the bridge, nor from the top of the train. Nor was there proof tending to show that the killing took place since the erection of the bridge which struck plaintiff. The trial court erred in receiving testimony of general notoriety.

The witness Epperson showed himself to be an expert. He should have been allowed to give his opinion, and his reason for it, as to the merits or demerits of the "whipping-straps" as cautionary signals, and whether or not they were generally in use on roads regarded as well regulated. It was rightly ruled that he could not give his opinion as to the prudent management of the Louisville and Nashville railroad, or any of its constituent sections.

The general charge given in this case, as we think the trial court intended it to be understood, is, in the main, free from error. We will first premise, however, that this case was tried as to all the counts on the double defense of not guilty, and proximate contributory negligence on the part of plaintiff. The effect of this double defense was, and is, that defendant denied all negligence on its part, and threw the burden of proof on plaintiff. As a further defense the defendant set up that if found to have been guilty of negligence, then plaintiff was

himself guilty of negligence which contributed proximately to the injury he suffered. The burden was on the defendant to make good this phase of its defense. Both lines of defense being interposed to the whole action, the defense of contributory negligence was not in whole, nor to any extent, an admission that the defendant had been guilty of negligence.

Some expressions in the general charge are subject to criticism. We will quote certain passages which possibly may have misled the jury, and with them will suggest such verbal alterations as will free them from all grounds of objection. The alterations are placed in brackets. They will be found to be, sometimes, merely explanatory, additional words or phrases, while at other times the words or phrases will be seen to be substituted for those found in the transcript. I begin with the first sentence in the first paragraph: "Which injuries [it is claimed] resulted from the negligence of the defendant, and [that] he would not have suffered [them] but for such negligence. . . . The defendant, on the contrary, [seeks to excuse itself for the low bridge, and alleges], first, [that] it was necessary to build the bridge at the height at which it was built. . . . It being the law of this state that a person entering the employment of a railroad [has a right to expect the railroad will furnish] safe appliances, etc. . . . In order to recover exemplary damages, it is not necessary that the defendant should have intended to commit the wrong, [if there was gross, reckless, or wanton negligence],—so gross as to evince an entire want of care," etc.

Charges to juries should, if possible, be plain, simple, and easily understood. They should be free from obscurity, involvement, ambiguity, metaphysical intricacy, and tendency to mislead. A charge obnoxious to any of these objections should always be refused, even though, on dissection, it may assert a correct legal proposition. The office and purpose of charges are to enlighten the jury, and to aid them in arriving at a correct verdict, as plain, common-sense men. In other words, they should be made up of plain propositions of law, applicable to the tendency or varying tendencies of the evidence, and they should go no further. Charges thus given greatly aid juries in their deliberations.

We do not know that we comprehend the meaning and import of charges 8 and 8 of the series styled "plaintiff's charges." Charge No. 3 asserts that when contributory negligence is pleaded, this is a confession "that the defendant was

guilty of the culpable negligence which is charged in the counts of the complaint to which it is pleaded, except so far as the plea traverses or denies the negligence of defendant charged in those counts, or sets up facts in qualification or avoidance of such negligence." This is an assertion that the plea of contributory negligence admits the negligence charged, unless the plea itself, not another plea, negatives or avoids such negligence. We have shown above that this is not the true rule. A denial of the negligence charged, or plea of not guilty, although pleaded separately, repels all presumption of confession which arises from the plea of contributory negligence when pleaded alone. And the last sentence of the charge does not heal the error, for each of the pleas, not guilty and contributory negligence, was pleaded to the entire complaint. Freedom from negligence is not one of the essentials of the defense of contributory negligence. There must be negligence in the defendant before the plaintiff can contribute to its injurious results: *Memphis etc. R. R. Co. v. Copeland*, 61 Ala. 376. Charge 8 is not only erroneous as a legal proposition, but the pleading furnishes no field for its operation.

Charge 8 hypothesizes that there was a defect in the construction of the bridge, and that such "defect arose from, or had not been discovered or remedied owing to, the negligence of defendant"; and asserts that the plaintiff is entitled to recover for the injuries received, "although he may have known that such defect existed, provided he was guilty of no negligence which proximately contributed to the injury; and provided further, that he knew that the defendant, or some person superior to himself in the service of the defendant, knew of said defect."

How the last proviso in this charge can become material on the inquiry of plaintiff's contributory negligence, is not perceived. It is undisputed that, by stooping, plaintiff could have passed the bridge in safety. The two phrases, "although he may have known that such defect existed," and "provided that plaintiff was guilty of no negligence which contributed to the injury," are incompatible with each other, when viewed in the light of the uncontroverted testimony. Having knowledge of the low bridge, and failing to stoop in passing it, would be proximate contributory negligence, even though every employee of the railroad had knowledge of the defect. Charges 8 and 9 should not have been given.

Charge 13, asked by defendant, was rightly refused: *Louis-*

v. etc. R. R. Co. v. Coulton, 86 Ala. 129. Charges 23 and 28 of defendant's series ought to have been given, and charge 44, in the state of the testimony, should not have been refused. There is no testimony tending to prove gross, wanton, or reckless negligence: *South etc. R. R. Co. v. Huffman*, 76 Id. 492; 52 Am. Rep. 349; *Alabama etc. R. R. v. Arnold*, 80 Ala. 600; 84 Id. 159; 5 Am. St. Rep. 354.

Under the rules of law declared above, and in the state of the proof found in the record, each of the main questions of fact—negligence of defendant and contributory negligence by plaintiff—was one of fact for decision by the jury.

Reversed and remanded.

RAILWAYS—BRIDGES.—A railroad company is not bound to build its bridges high enough to enable its employees to safely pass thereunder while standing upright upon the top of the company's cars: *Baylor v. Delaware etc. R. R. Co.*, 40 N. J. L. 23; 29 Am. Rep. 208; *Rains v. St. Louis etc. R'y Co.*, 71 Mo. 164; 36 Am. Rep. 459. But see *Louisville etc. R'y Co. v. Wright*, 115 Ind. 378; 7 Am. St. Rep. 432, and note. Neglect to keep a bridge in repair across a cut made by a railroad company, where the track crosses a public highway, is an indictable offense: *New York etc. R. R. Co. v. State*, 50 N. J. L. 303.

RAILWAYS—HIGHWAY CROSSINGS.—A railroad company constructing its track across a public highway must restore the highway to its former condition as nearly as possible: *Evansville etc. R. R. Co. v. Carver*, 113 Ind. 51; *Ridge etc. R'y Co. v. Philadelphia*, 124 Pa. St. 219; *Dyer County v. Railroad*, 87 Tenn. 712; compare *Gulf etc. R'y Co. v. Rowland*, 70 Tex. 299. A street railway company must keep its entire road-bed, and particularly its crossings, in repair, so as not to inconvenience travel across its track or longitudinally upon it: *Railway Co. v. State*, 87 Tenn. 746. All railway companies interested in the same railway crossing must co-operate in keeping such crossing in repair: *Indiana etc. R'y Co. v. Barnhart*, 115 Ind. 399.

RAILWAY CROSSINGS—STATUTORY REGULATIONS—SIGNALS, ETC.—It is the duty of a railroad company to give warning of the approach of its trains: *Chicago etc. R. R. Co. v. Dillon*, 123 Ill. 570; 5 Am. St. Rep. 559, and cases cited in note 564; *Duane v. Chicago etc. R'y Co.*, 72 Wis. 523; 7 Am. St. Rep. 379; *Brown v. Griffin*, 71 Tex. 654; note to *Houston etc. R'y Co. v. Booser*, 8 Am. St. Rep. 618. A company is liable for injuries resulting from the negligence of its flag-man stationed at a crossing to signal approaching trains: *Pennsylvania Co. v. Sloan*, 125 Ill. 72; 8 Am. St. Rep. 337, and note 345. It may be negligence on the part of a company not to keep a flag-man at its crossing, although such duty is not prescribed by statute: *Houston etc. R'y Co. v. Booser*, 70 Tex. 530; 8 Am. St. Rep. 615; and where a railroad track crosses a public highway in a densely populated district, the company, maintaining no bars or gates there, must keep a flag-man at such point, and failing to do so, is guilty of gross negligence: *Central P. R'y Co. v. Kuhn*, 86 Ky. 578; 9 Am. St. Rep. 309, and note 318. But contributory negligence on the part of complainant may bar his right to recover, although the railroad company has failed to perform its duty at its crossing: *Greenwood v. Philadelphia etc. R. R. Co.*, 124 Pa. St. 572; 10 Am. St. Rep. 614. It is negligence for a railroad train to

back at a speed greater than allowed by the city ordinance, not signaling its approach by ringing its bell, or otherwise: *Virginia etc. R'y Co. v. White*, 84 Va. 498; 10 Am. St. Rep. 874; compare *Cooper v. Lake Shore etc. R'y Co.*, 68 Mich. 261; 11 Am. St. Rep. 482, and note 491. The duty required of a railroad company approaching its crossings is of the highest degree to its passengers and to travelers passing at such crossing: *Bailey v. Hartford etc. R. R. Co.*; 56 Conn. 444. The chief purpose of statutory regulations as to the duties required of railroad companies at and approaching crossings is to protect human life: *Missouri P. R'y Co. v. Lee*, 70 Tex. 496. The duty of ringing the bell or blowing the whistle is a duty imposed for the protection of persons and live-stock at crossings and depot-grounds, and no where else: *Nashville etc. R. R. Co. v. Hembree*, 85 Ala. 481. It is negligence upon the part of a railroad company to disregard duties imposed upon it by statute: *Palmer v. St. Paul etc. R. R. Co.*, 38 Minn. 415; *Indiana etc. R. R. Co. v. Barnhart*, 115 Ind. 399. Compare *New York etc. R'y Co. v. Grand Rapids etc. R. R. Co.*, 116 Id. 60.

CONTRIBUTORY NEGLIGENCE — INSTANCES OF WHAT IS: See note to *Columbus etc. R'y Co. v. Bridges*, 11 Am. St. Rep. 66, 67; *Laffin v. Buffalo etc. R. R. Co.*, 106 N. Y. 136; 60 Am. Rep. 433. For contributory negligence on the part of an employee which will defeat his right of recovering for injuries suffered by reason of a railroad company's negligently constructed bridge, see *Baltimore etc. R. R. Co. v. Stricker*, 51 Md. 47; 34 Am. Rep. 291; *Pittsburg etc. R'y Co. v. Sentmeyer*, 92 Pa. St. 276; 37 Am. Rep. 684; *Manfield etc. Co. v. McEnery*, 91 Pa. St. 185; 36 Am. Rep. 662; compare *Wilson v. Louisville etc. R. R. Co.*, 85 Ala. 269. An employee waives any claim for damages resulting from a negligently constructed railroad bridge, where he remained in the service of the company after notice of the dangerous character of such bridge: *Louisville etc. R'y Co. v. Sandford*, 117 Ind. 265. Employees of one railroad company are not guilty of contributory negligence in failing to anticipate a breach of duty of another company whose track crosses the track of their road: *New York etc. R'y Co. v. Grand Rapids etc. R. R. Co.*, 116 Id. 60.

NEGLECT — PLEADING. — As to the sufficiency of a complaint in an action for injuries occasioned by negligence of a defendant, see *Rolseth v. Smith*, 38 Minn. 14; 8 Am. St. Rep. 637, and note 639. Compare *Brannan v. Kokomo etc. Gravel Road Co.*, 115 Ind. 115; 7 Am. St. Rep. 411, and particularly note 417, as to whether contributory negligence is a matter to be pleaded, or whether it may be relied on as a matter of defense without special averment. A complaint by an employee against a railroad company, for injury sustained by reason of defendants' negligence in maintaining a bridge which, being unsafe, fell beneath an over-running train, is bad unless it alleges that such employee was ignorant of the unsound condition of the bridge: *Louisville etc. R'y Co. v. Sandford*, 117 Ind. 265; compare *East Tennessee etc. R. R. Co. v. Pratt*, 85 Tenn. 9; *Pugan v. St. Paul etc. R. R. Co.*, 40 Minn. 544. The competency and skill of an engineer is not raised by an allegation in a complaint that a railroad company permitted its engine to be out of repair, and to be negligently used: *Babcock v. Chicago etc. R'y Co.*, 72 Iowa, 197.

HARMLESS ERROR. — Sustaining a demurrer to a special plea is a harmless error, if error at all, when defendant under another plea receives the benefit of whatever defense he might have used under the special plea demurred to: *Manning v. Maroney*, 87 Ala. 563; *ante*, p. 67.

EVIDENCE — EXPERT TESTIMONY. — A competent expert may give an opinion as to the distance at which it is safe to stop before going upon a

crossing of a railroad track and a public highway: *New York etc. Ry Co. v. Grand Rapids etc. R. R. Co.*, 116 Ind. 60; compare *Johnson v. Missouri Pac. Ry Co.*, 96 Mo. 340.

MASTER AND SERVANT — LIABILITY FOR INJURIES TO EMPLOYEE. — Plaintiff, a brakeman, in an action against a railroad company for negligence in maintaining defective brakes, need not prove that defendant had knowledge of defects in the brakes and appliances: *Louisville etc. R. R. Co. v. Coulton*, 86 Ala. 129. A servant can presume that his master has performed his duty in providing suitable appliances and safe machinery: *Ayers v. Richmond etc. R. R. Co.*, 84 Va. 679.

NEGLIGENCE — BURDEN OF PROOF. — The plaintiff, a servant, must raise a reasonable presumption of negligence on the part of the defendant, the master, in an action to recover for injuries alleged to be caused by the master's negligence: *C. & O. R. R. Co. v. Lee*, 84 Va. 642; because the presumption is, that the master has discharged his duty to his servant, and this presumption must be overcome before plaintiff can recover: *Murray v. Denver etc. Railway Co.*, 11 Col. 124.

INSTRUCTIONS. — Correct instructions may be refused when the substance thereof has already been given in other instructions: *Virginia etc. Ry Co. v. White*, 84 Va. 496; 10 Am. St. Rep. 874, and note 882, as to instructions, generally, which may be refused.

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

[IN BANK.]

PEOPLE v. SWALM.

[80 CALIFORNIA, 45.]

SEPARATE PROPERTY OF WIFE. — PROPERTY BOUGHT BY A WIFE ON THE CREDIT OF HER HUSBAND, without his previous authority, but eventually paid for by him, and which he never gave to her as her own, is not her separate estate; and in an indictment for larceny, it is properly charged to be the property of her husband.

COMMUNITY PROPERTY. — POSSESSION OF WIFE IS THAT OF HER HUSBAND as to community property. The wife's interest in such property is a mere expectancy.

COMMUNITY PROPERTY, LARCENY OF. — One may be convicted of the larceny of community property, notwithstanding it was given into his possession by a wife, who consented to have it taken with the felonious intention of depriving her husband of it.

LARCENY OF COMMUNITY PROPERTY, EVIDENCE SUFFICIENT TO SUSTAIN CONVICTION FOR. — Defendant is properly convicted of larceny, where it appears that he had seduced a wife, and had been handed property by her to be taken away from the state; that he afterwards declared the property to be that of a third person; that he was going away under an assumed name; and that he tried to bribe the officer who arrested him while he was attempting to leave the state with such property in his possession.

CRIMINAL LAW — EVIDENCE. — IN A PROSECUTION FOR LARCENY OF THE PROPERTY OF A MARRIED MAN, which had been given into the possession of the defendant by the former's wife, evidence of adulterous intercourse between the wife and defendant is properly received, because it tends to show that the taking was against the will of her husband, and with an intent to deprive the husband of the property.

COMMUNITY PROPERTY PURCHASED BY THE WIFE ON THE CREDIT OF HER HUSBAND NEED NOT BE REDUCED TO HIS POSSESSION to impress it with the quality of community property.

IN PERSONAL ORNAMENTS OF A WIFE in her exclusive possession, and suitable to her condition in life, may be presumed to be her separate property, this presumption is sufficiently rebutted when the husband testifies that they have been acquired during the marriage; that he had never given them to her, and that they were not her exclusive property.

G. B. Darwin, for the appellant.

Johnson, attorney-general, Flournoy and Mhoon, and Sawyer and Burnett, for the respondents.

FOOTE, C. The defendant was convicted of the crime of grand larceny, and from the judgment rendered upon the verdict of the jury, and an order denying him a new trial, he appeals.

His first claim for the reversal of the judgment and order is, that the property, consisting of certain valuable articles of jewelry, which he is alleged to have stolen, was not the property of the person alleged to be the owner thereof as charged, but was the separate property of his wife.

There is evidence in the record which the jury evidently believed, and which it was their right so to do, which showed that the property in question was bought upon the credit of the husband, and was paid for by him; that the purchase of it by the wife was not authorized by him, but that he finally paid for it, there being no evidence that either spouse purchased it with separate money. It also appears that the husband never gave the wife the property as her own, but made an effort to have it returned to the seller, but it was never returned, and it was afterward given into the hands of the defendant by the wife to be taken out of this state after she had become connected with him.

Swalm was arrested while endeavoring clandestinely, under an assumed name, to leave this state, and the property found in his possession. He endeavored to bribe the officer arresting him to allow him to proceed on his journey, without avail.

His main defense is, that the wife intrusted him with, or what at least he believed to be such, her separate property, to deposit for her in New York, and that he had no intent to steal any property from her husband.

The property, as has been stated, when it came to the hands of the wife, was that which had been bought upon the husband's credit, billed to and paid for by him, costing several thousand dollars, it not appearing that the separate money of either spouse was used to pay for it. Being acquired after

marriage in this way by either or both husband and wife, it became community property: Civ. Code, sec. 164. Thus acquired, it came to the possession of the wife from her husband, he having never given it to her as separate property. It remained common property when she handed it over to Swalm.

The possession of the wife is that of the husband as to community property: *Schuler v. Savings and Loan Society*, 64 Cal. 400. He had the title to it, and right of control over it; the wife's interest was a mere expectancy: *Greiner v. Greiner*, 58 Id. 119.

The property being that of the husband, and in his possession, the sole question left for determination was, What was the intent of the defendant in taking and carrying it away?

The evidence tending to show that he had seduced the wife, and had been handed the property by her to take away from the state; that he afterward falsely declared it not to be her property, but that of a third party; that he was going away under an assumed name; that he tried to bribe the officer arresting him, and the other facts and circumstances in the case,—were, as we think, sufficient to warrant a belief in the minds of the jury either that the property was purchased by the wife, upon the husband's credit, at the instigation of the defendant, then having the intention, if he could, to steal it from both parties, and that the theft was afterward consummated; or that he received the property from the wife, knowing it to be the husband's, and taken against his will, with a view to steal it. In either point of view, the larceny was complete, for it was the taking and carrying away with felonious intent the personal property of another.

The question of intent was a matter solely for the jury, and they have found against the defendant upon conflicting testimony, and, as we think, properly.

Suppose the wife did consent to the taking away of the property of her husband, if the defendant took it with the felonious intent of depriving the husband of it, her consent when she had repudiated her relation of wife would not help him: 2 Bishop's Crim. Law, sec. 873, 874, and cases cited. And the evidence tending to show adulterous intercourse between the defendant and the wife of the owner of the property was admissible and proper, as going to show that the defendant knew that the taking was against the will of the husband, and tending to show that the defendant took the same with intent to deprive the husband of it. The improper intercourse

did not make the offense larceny, but it threw a clear light upon the intent of the taking, as showing that the wife's consent was without her husband's knowledge, against his will, and that the defendant knew the facts, and that his intention in taking it was to steal it from the husband: *People v. Cole*, 43 N. Y. 508.

There was no necessity, as the appellant contends, that the husband after the purchase should have reduced the property in dispute to manual possession. For when acquired, as it was, it became common property, and the wife's possession was the husband's.

The court instructed the jury that the exclusive possession of the wife of the property, being personal ornaments, would warrant the presumption that they were her separate property, and also that this presumption was liable to be rebutted. There was no evidence, as has been observed, that the jewelry had been purchased with the separate property of either spouse. There was the positive evidence of the husband that they had been acquired during the marriage, that he had never made a gift of them to her, and that they were not hers exclusively. This the jury believed, and that is sufficient.

The question as to the belief of the defendant when he took the jewels as to the person to whom the property belonged, was for the jury. They found, as we think properly, that he knew the property was that of the husband.

There is nothing in the point that larceny in this state is different from what it is at the common law: Pol. Code, sec. 4468.

The defendant was found guilty, not of adulterous larceny, as he claims, of which crime there is no mention in our Penal Code, but of grand larceny, which is "the felonious stealing, taking, carrying, leading, or driving away the personal property of another," exceeding the value of fifty dollars: Pen. Code, secs. 484, 487.

It is contended by the appellant that it was error for the trial court to refuse an instruction that the possession of personal property by a wife creates a legal presumption that it belongs to her, which must be overcome by a party who would establish the contrary.

The case was apparently tried in the court below, upon both sides, upon the theory claimed by the defendant here, that the possession of the wife of personal ornaments suitable to her condition, during the continuance of the community, creates a

presumption of ownership in her which is disputable. Conceding without deciding, and for the purposes of this case only, notwithstanding what has been said by the appellate court in *Meyer v. Kinser*, 12 Cal. 253, 254, 73 Am. Dec. 538, that the appellant's view of the law as asked for in the refused instruction is correct, yet the court below in its charge to the jury had already said: "There are several presumptions of law which the code says are disputable, that is to say, they may be controverted by other evidence, and which should control jurors in their action. And among these is, that things which a person possesses are owned by him or her. And I charge you that the exclusive possession by a woman of personal ornaments, such as necklace, bracelets, and such articles as are usually worn by a woman in her condition of life, creates a legal presumption that they are hers, and the presumption increases in strength with the length of time that such possession continues." This was a full statement of the general principle involved in the instruction, and besides, it was made applicable to the facts in evidence. A repetition of the general proposition of law, as claimed and asked for, was entirely unnecessary. Upon the whole record we perceive no prejudicial error, and advise that the judgment and order be affirmed.

HAYNE, C., and VANCLIEF, C., concurred.

The COURT. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

Rehearing denied.

COMMUNITY PROPERTY. — The presumption attending possession of property by either spouse is that it belongs to the community: *Meyer v. Kinser*, 12 Cal. 247; 73 Am. Dec. 538; *Althof v. Conheim*, 38 Cal. 230; 99 Am. Dec. 363; *Peck v. Brummagim*, 31 Cal. 440; 89 Am. Dec. 195; *Cooke v. Bremond*, 27 Tex. 457; 86 Am. Dec. 626, and note 629. Property acquired during marriage is presumed to be community property, and the burden of proving it to be separate property is upon him who asserts it: *Morris v. Hastings*, 70 Tex. 26; 8 Am. St. Rep. 570. That property purchased during marriage should be considered the separate property of one of the spouses, it must clearly appear that the funds with which such property was acquired were the separate property of such spouse: *Morris v. Hastings*, 70 Tex. 26; 8 Am. St. Rep. 570; *Jones v. Epperson*, 69 Tex. 586; *Blum v. Ross*, 116 Pa. St. 163.

LARCENY — EVIDENCE. — In a prosecution for larceny, a forged and fabricated bill of sale executed by defendant for the property, alleged to have been stolen, was admissible against defendant, where such bill of sale was found in possession of the defendant: *Williams v. State*, 27 Tex. App. 466.

[IN BANK.]

KARNS v. OLNEY.

[80 CALIFORNIA, 90.]

PRINCIPAL AND AGENT. — THAT AN AGENT WHO MADE A SALE OF REAL ESTATE WAS NOT AUTHORIZED IN WRITING to do so is immaterial, if it was made in the presence of the principals at the request of one of them, and the money paid is at the same time handed to the other, and the purchaser takes possession under his contract, and makes valuable improvements with the knowledge of the principals, who instructed such agent to make out a contract of sale, and the latter, pursuant to such instruction, executed such contract.

ESTOPPEL. — VENDORS OF REAL ESTATE ARE ESTOPPED FROM DENYING THE VALIDITY OF A SALE THEREOF made by their agent, not authorized in writing, when such sale is made with their knowledge, and according to their instructions, an installment of the purchase-money paid to them, and the contract of sale concluded in the name of the agent, and the purchaser permitted without objection to take possession and make valuable improvements.

ESTOPPEL. — ONE WHO WITH KNOWLEDGE ACCEPTS THE PROCEEDS OF AN UNAUTHORIZED SALE of his property is estopped to dispute the validity of such sale.

ONE CONTRACTING IN A CORPORATE NAME, OR IN ANY NAME NOT HIS OWN, and accepting the benefit of such contract, cannot avoid it because he did not employ his own proper name. The rule is the same when the contract is made in such adopted name by his agent, acting under his instructions.

UNCERTAINTY IN CONTRACT OF SALE IN REAL ESTATE WILL NOT AVOID IT WHEN SUCH UNCERTAINTY CONSISTS in the fact that it purports to be "subject to the conditions in a formal contract as to clearing streets, improvements, etc.," and the contract so referred to is one to be entered into in the future. Nor is it any objection to such contract that it provides that it shall be surrendered "on delivery of a formal contract or deed."

LACHES IN SUING FOR A SPECIFIC PERFORMANCE OF A CONTRACT FOR THE SALE OF REAL ESTATE will not defeat plaintiff, if such delay was the result of the acts of the defendants or their predecessors in interest in attempting to deceive the plaintiff, and to deprive him of the benefit of his contract.

THE DOCTRINE THAT THE RECORD OF A DEED IS CONSTRUCTIVE NOTICE applies only against subsequent purchasers and encumbrancers.

C. E. Sumner, and Chapman and Hendrick, for the appellant.

Olney, Chickering, and Thomas, for the respondent.

WORKS, J. This is an action by the appellant for the specific performance of a contract to convey real estate. The findings of the court were, in substance, that one Mills and one Wicks, being in possession of the lot in controversy, and a large number of other lots in Pomona, in this state, under a contract of purchase, began the sale thereof, and, for the pur-

pose of making such sales, appointed one F. H. Hall to be the manager and agent at Pomona, aforesaid; that Hall had not full authority to act for said Mills and Wicks in the sale of the lots and lands, but that the court was unable, from the evidence, to define with exactness the extent of his general authority; that the said Hall, under and in pursuance of his appointment and authority, acted as such manager and agent for the sale of said lots and lands, and was, by reason thereof, known and recognized as such manager and agent by the general public, and by the said Mills and Wicks, and by the purchasers mentioned; that on the twenty-eighth day of September, 1882, the said Mills and Wicks did, by their said agent, Hall, make and enter into a verbal agreement with one William Bayles, agreeing to sell, and he agreeing to purchase, the lot of land in controversy for the sum of two hundred dollars; that when said agreement was made, said Mills and Wicks were both personally present, and the agreement for them by Hall was made then and there, but not under the personal direction of Mills and Wicks; that Bayles then and there, in pursuance of said agreement, paid Hall the sum of fifty dollars on the purchase price, and Hall, being such agent, paid said sum, as and being such part payment of said purchase price, over into the hands of said Wicks upon the request and direction of said Mills, and wrote and delivered to said Bayles the receipt therefor, in the words and figures following:—

“\$50.

POMONA, September 30, 1882.

“Received of W. M. Bayles fifty dollars on account for lot 6, block 32, for which a contract will be given on payment of balance of one third of contract price of two hundred dollars.

“F. H. HALL, Agent for Pomona Company.”

That within a few days thereafter, on the thirtieth day of October, 1882, in pursuance of their plan for the sale of said lots and lands, said Mills and Wicks formed with others a corporation by the name of the Pomona Land and Water Company, with its capital stock divided into 5,000 shares; that Mills and Wicks owned 4,180 of said shares, and the other three share-holders necessary to form a corporation represented 820 of said shares; and for the purpose of carrying out said enterprise for the sale of said lots and land, they transferred the same to said corporation, excepting from the operation of said assignment all lots and lands already conveyed to them by Louis Phillips, and that Hall continued to

act as agent for the sale of said lots in the same manner as before said transfer; that said Hall made thirty-nine sales of said lots and lands, including the sale of the lot in question, to Bayles, as such manager and agent for Mills and Wicks; that before they assigned the same to said company, and afterward, the said Mills and Wicks supplied said agent, Hall, with printed blanks, containing the name of the said Pomona Land and Water Company printed thereon as vendor, and instructed the said agent, Hall, to use the same in making contracts for sales thereof to be made, and expressly directed and instructed said agent to fill out said blanks with the terms of sale, and deliver them to all purchasers, including said Bayles, to whom sales of lots had already been made by them in their individual capacity; and that Hall carried out said instructions, whereby Bayles was induced to believe that said agreement was adopted by said company; that on the twenty-first day of September, 1882, Bayles, under and in pursuance of his said agreement, paid to Hall, then acting as the manager and agent for the sale of said lots and lands, the further sum of sixteen dollars, and that Hall, pursuant to said instructions, given as aforesaid, filled out and delivered to Bayles one of the said printed blanks, supplied by Mills and Wicks for the purpose, in the words and figures following:—

“POMONA LAND AND WATER COMPANY,

“POMONA, LOS ANGELES, September 28, 1882.

“Received of William Bayles fifty dollars, deposit on contract for purchase of lot six (6), in block thirty-two (32), according to the map of Pomona. Contract duly recorded in book 8, pages 90 and 91, of miscellaneous records of Los Angeles County, subject to the conditions in a formal contract as to cleaning streets, improvements, etc.; said price being \$200, and terms of payment, \$16 to make the one third on demand, \$67 payable September 28, 1883, \$67 payable September 28, 1884. Deferred payments to bear eight per cent interest, payable annually; and the said William Bayles, in consideration of the premises, hereby agrees to purchase said property for the same price and on the terms above set out, this to be surrendered on delivery of formal contract or deed.

“F. J. HALL,

“Manager of Pomona Land and Water Company.”

That on the twenty-fourth day of January, 1883, the said Bayles, for a good and valuable consideration, assigned and transferred to the plaintiff all his interest in said lot and said

agreement, and the plaintiff thereupon entered into possession of said lot, with the knowledge and consent of Hall, agent as aforesaid, plowed the whole of said lot, and put substantial improvements thereon; that said Bayles and the plaintiff kept and performed all the conditions of said agreement to be kept by them, paid the sum of \$66, the first payment of said purchase price, and tendered to the Pomona Land and Water Company the sum of \$67 and interest thereon to date, according to the terms of said agreement; that on the twenty-eighth day of September, 1883, and on the twenty-ninth day of September, 1884, plaintiff tendered the said company the sum of \$134 and interest thereon to date, being the whole balance of said purchase-money, according to the terms of said agreement, and demanded the execution of a deed of conveyance, and the company refused to accept said payments and execute the deed, but made no objections to the terms thereof, or to said tenders; that on the twenty-seventh day of November, 1886, he tendered to the defendant the sum of \$176.90, being the full amount of the purchase-money remaining unpaid, and tendered a deed of bargain and sale for execution, and the defendant specified no objections to said tender, nor to the terms of said conveyance, but declined to receive said purchase-money, and refused to execute said conveyance; that by a deed dated December 4, 1882, Louis Phillips conveyed said lot to said Mills and Wicks, and by a deed dated February 23, 1883, said Wicks conveyed his interest therein to said Mills, and by a deed dated September 21, 1883, while plaintiff was in possession of said lot under said agreement, Mills, knowing that plaintiff was so in possession, conveyed said lot to one Charles French, who had full knowledge of plaintiff's possession under said agreement, and the other facts herein set forth, and that French was in the employ of said Pomona Land and Water Company under said Mills and Wicks, and paid no consideration for said conveyance; that Mills died on the twentieth day of April, 1884, and his wife was appointed his administratrix, and included this lot in the inventory of the property of said estate; that in May, 1883, the plaintiff had notice that the Pomona Land and Water Company repudiated the alleged agreement; that said French, from the time of his deed from Mills, asserted to plaintiff his ownership of the lot, and disputed the possession thereof; that French, some time in 1884, removed plaintiff's improvements, but plaintiff replaced them within two or three months, and for a

Aug. 1889.]

KARNS v. OLNEY.

short period of that year leased the premises, and that house and fence erected by him remained on the property until removed by the defendant in October, 1886; and French, for a short time just previous to his deed to defendant, leased the property, and that the defendant entered the lot October 20, 1886, but did not oust plaintiff; that February, 1888, said Wicks, as attorney for the Pomona Land and Water Company, wrote the plaintiff a letter notifying that Hall had acted without authority in making the contract and that the same was repudiated, and offered him one hundred dollars if he would return the receipt for cancellation; but that Wicks had not been authorized by the company to write such a letter; that neither Wicks nor Mills knowingly or intentionally ratified or confirmed the contract, or voluntarily accepted any benefits or obligations thereof; that said Mills and Wicks, by their acts and conversation as aforesaid, induced the said Bayles to purchase said lot from the defendant by their said agent, Hall; that said printed blank was used and the agreement in the name of the Pomona Land and Water Company, delivered as aforesaid by Hall, agent as aforesaid, and accepted by Bayles, because Mills and Wicks instructed Hall to use the same for that purpose, and not in reason of any fault or neglect of said Bayles or the plaintiff; and the use thereof caused Bayles to believe that said agreement was adopted by said company, promoted by said Wicks and Mills as aforesaid; that the use of said printed blank caused the plaintiff to believe that said sale was in fact actually made by said company, as therein specified; that Mills and Wicks never demanded payment of the balance of the purchase-money of said lot, nor communicated to plaintiff that said sale was made by them in their individual capacity, but on the contrary, further gave the plaintiff cause to believe that said sale was made by said company, and that the plaintiff had any interest in said lot, and attempted to affirm said sale, alleging as a ground that said Pomona Land and Water Company never acquired title to said lot; and that therefore said Hall never had authority to sell the same; that all the deeds of conveyance referred to above were made immediately after their respective dates, and that the plaintiff had constructive notice thereof; and that about the time that said sale was made in the actual presence of Mills and Wicks, under their direction, for them, in the

dividual capacity, by said agent, Hall, and that said Mills and Wicks had taken a conveyance of said lot from said Louis Phillips to themselves, and recorded the same on the day preceding said transfer of their said contract with Louis Phillips to said company, and thereby prevented said company from acquiring title to said lot; that the plaintiff's supposed cause of action is not barred by the statute of limitations. This suit was commenced December 10, 1886.

On these findings the court concluded in favor of the defendant, and the plaintiff appeals.

It is contended by the plaintiff that he was entitled to judgment on these findings, and that the cause should be reversed on that ground.

In this contention the appellant is clearly right.

We do not know upon what ground the court below concluded that the plaintiff's case was not made out, but counsel for respondent attempt to justify the decision on four grounds: 1. That the original receipt given by Hall did not constitute a sufficient contract of sale; 2. That Hall had no authority to make the sale, not having been authorized in writing; 3. That the original receipt, and the contract subsequently given by Hall, were not executed by the then owners, Wicks and Mills, but by the Pomona Land and Water Company, in its name, and was otherwise indefinite and insufficient; 4. That the action was commenced too late.

In discussing these questions, counsel for respondent have not confined themselves to the findings, but have very ingeniously used the findings where they support their case, and where they are against them the findings are ignored, and the evidence in respondent's favor, and against said findings, is used instead. By thus combining the two, and holding fast only to that which seems to them to be good, they have convinced themselves that "the case is too plain for argument." This we cannot do, and perhaps for that reason we are unable to agree with counsel. Taking the facts as we have them in the findings, we consider the points relied upon by the respondent.

1. As to the point that the original receipt given at the time the first payment of fifty dollars was made was not sufficient, we agree with counsel, but this was not intended to constitute the contract, but simply as a memorandum showing the payment of the money, and it was stated therein that a contract would be given upon the payment of the balance of the one-

third payment; and such a contract was afterward executed. For this reason we regard this receipt as of no great importance.

We regard the question of Hall's authority to make the sale as of no greater consequence in view of the other facts found. It may be conceded that an appointment in writing was necessary to authorize him to make a binding sale: Code Civ. Proc., sec. 1624; and that no subsequent parol ratification or acknowledgment by the principal is sufficient: *Videau v. Griffin*, 21 Cal. 390; *Blum v. Robertson*, 24 Id. 142. But here the sale was in legal effect made by the principals: *Videau v. Griffin*, 21 Id. 391, 392. It was made in their actual presence, and at the request of one of them the money paid was handed to the other immediately. It is true, the court finds that the sale was not made under the personal direction of the owners, and that they did not knowingly or intentionally ratify or confirm the said contract of sale, nor voluntarily accept any of the obligations or benefits thereof, but these conclusions are clearly disputed by the facts found. They did voluntarily receive the cash payment at the time it was made, and the court finds that they afterward instructed Hall to make a contract for the property. The facts show that the only reason for the finding that they did not knowingly or intentionally ratify or affirm the contract of sale was, that they did not know the location of the lot, or in other words, the lot was a better one than they supposed when they sold it and accepted the purchase-money, and therefore they wanted to escape from the contract.

The findings further show that the purchaser took possession under his contract, and made valuable improvements on the property with the knowledge of these parties. Beside, the court finds, throughout these findings in various places, that Hall was the agent of these parties, and that they did the acts relied upon by the plaintiff through him. The court finds in one place that Hall did not have "full" authority, but what is meant by the word "full" in this connection is left to conjecture. The finding on the point is: "All allegations of the several paragraphs of the complaint, which are respectively numbered and marked 2, 3, 4, 5, and 6, are true, except that F. J. Hall did not, as alleged in paragraph 2, have full authority to act for the said Mills and Wicks in the sale of the lots and lands referred to therein (but if it be essential, I am unable, from the evidence, to define with exactness the extent of his general authority)."

This finding as to authority relates, not to this sale particularly, but to an allegation in the complaint that Hall was appointed to be manager at Pomona, "with full authority to act for them," in the sale of all of the lands then held for sale by them at that place; and the following specific allegation of the complaint, relating to this particular sale, is found to be true: "That on the twenty-eighth day of September, 1882, the said Mills and Wicks were in possession of the said lot of land hereinabove particularly described, under said agreement for the purchase thereof from Louis Phillips, and did then at Pomona aforesaid, by their said agent, F. J. Hall, make and enter into a verbal agreement with one William Bayles, whereby the said Mills and Wicks agreed to sell, and the said William Bayles agreed to purchase, the said lot of land described as lot 6, as aforesaid, for the sum of two hundred dollars, on the terms set out in the seventh paragraph of this complaint."

And the court further finds in express terms that the allegation of the complaint is true that they instructed their said agent to make out this and the other contracts, where sales had been made, and how to make and execute them, and that in pursuance of these instructions he did execute the contract, and that the plaintiff, as the assignee of said contract, entered into possession and made improvements.

This, it seems to us, was a sufficient finding of the agency; but if not, the conduct of the vendors of the property was such as to estop them from denying it, or asserting any claim to the property on the ground of his want of authority. To permit the vendors of land to repudiate the acts of their supposed agent under such circumstances would be to sanction a clear and palpable fraud, and this cannot be done even under the guise of the statute of frauds: *Sedgwick and Wait on Trial of Title to Land*, secs. 844-847; *Fry on Specific Performance*, 259, 260; *Bigelow on Estoppel*, 8d ed., 470, 513.

It is a well-settled rule of estoppel that one who with knowledge accepts the proceeds of an unauthorized sale of his property is estopped to dispute the validity of the sale: *Goodman v. Winter*, 64 Ala. 410, 433; 38 Am. Rep. 13; *France v. Haynes*, 67 Iowa, 139; *Schenck v. Sautten*, 73 Mo. 46; *Moore v. Hill*, 85 N. C. 218; *Field v. Doyon*, 64 Wis. 560; *Booth v. Wiley*, 102 Ill. 84, 107; see also, as bearing on this point, *Escolle v. Franks*, 67 Cal. 137.

In this case the vendors stood by and saw the sale made, and accepted the purchase-money in the presence of the ven-

deed, and the court finds that they "by their acts and conversation aforesaid induced the said Bayles to purchase said lot from them by their said agent, Hall," which, it seems to us, presents the strongest possible case against them. If they did not know the location of the lot that was being sold, as claimed, their want of knowledge must be attributed to their own want of care. They cannot, in view of these facts, be heard to deny such knowledge.

It is contended that this was not the contract of Mills and Wicks, but of the Pomona Land and Water Company. It is true, the contract is signed by Hall as the manager of the company, but the findings show clearly that the contract was that of Mills and Wicks, and that they had, before the organization of the corporation, adopted and used the name afterward given to the corporation, and that they instructed their agent, Hall, to prepare and sign the contract in that form. They had the right to adopt and contract in a name not their own, and having contracted in that name and received the benefits thereof, they cannot be allowed to impeach it on that ground.

Again, it is urged that the contract was too uncertain and indefinite to authorize the relief sought. We do not think so. The land is accurately described, and the amount and time of making the payments are clearly stated. There are but two elements of uncertainty in the contract. It is made "subject to the conditions in a formal contract as to clearing streets, improvements, etc." This evidently refers to a "formal" contract that was expected to be made in the future, and if it was too uncertain to uphold this clause or to bind the vendee to the condition attempted to be imposed, it can furnish no ground upon which the vendors could repudiate the contract. It is no where shown that the refusal to consummate the agreement was ever placed on any such ground, or that any question was ever made as to the conditions intended to be imposed by this clause in the contract. If such a "formal" contract existed, and the parties contracted with reference to it, the question might have been raised in respect to the form of the deed, when demanded, and if a deed with the conditions relied upon had been refused, the vendors might have been justified in refusing to execute one without such conditions. But we do not regard this as such an element of uncertainty as will vitiate the whole contract. The court finds that no

objection was made to the form of the deed tendered for execution when the purchase-money was tendered.

The further objection made to the contract is, that it provides that it shall be surrendered "on delivery of formal contract or deed." The apparent reason for having drawn the contract in such form as to call for either a contract or a deed is, that at the time the contract was executed the vendors had no deed, but were holding under a contract. It was the evident intention that if they procured a deed before the final payment of the purchase-money, a deed was to be executed; if not, a contract for a deed. But whether this be so or not, it clearly appears from the contract itself that the vendee was to have their title to the property upon payment of the purchase-money, and the time was definitely fixed by the time of the final payment of the purchase-money and surrender of the contract.

We think the contract was sufficient to authorize the relief prayed for.

Lastly, it is claimed that the action was brought too late. Cases are cited by counsel in which shorter delays were held to be fatal, but each case must depend upon its own circumstances. There is no absolute bar short of the time fixed by the statute of limitations. There is nothing of unfairness or injustice in allowing the appellant his remedy in this case after the delay complained of. It is perfectly apparent from the findings and the evidence that there was a systematic and persistent effort all along on the part of Mills and Wicks to mislead the plaintiff, and prevent his getting title to the property. It was not transferred to the corporation, but he was allowed to believe it was, if not led to that belief by these parties. Wicks conveyed to Mills, and Mills conveyed to one French, an employee, without consideration for the conveyance, and French, acting undoubtedly for Mills, endeavored to get possession of the property, and claimed that he was the owner, and tore down the appellant's improvements. That French held the title for Mills, and with the sole purpose of attempting to deprive the appellant of the property, is apparent from the fact that upon the death of Mills, although French held Mills's deed for the property, it was inventoried by the widow as a part of the estate. French conveyed the same to the respondent, who admits, in his brief in this court, that he holds it as a trustee for the widow. In other words, so far as it affects this question of delay in bringing the action, this

property must be regarded as having been the property of the original vendors all along, and that they have been attempting to keep it out of the appellant's reach. Beside, one of the very material facts in the case, and one without which probably he could not have recovered, was, that this contract was made in the actual presence of the owners, and the money paid to and received by them, and this was not discovered by the appellant until a very short time before bringing this suit. Without a knowledge of this fact, if there were no others tending to excuse his delay, he might well have hesitated about bringing the suit; and taking this circumstance, together with the conduct of the vendors, we are not inclined, on the mere ground of delay in bringing the action, to deny the appellant his rights.

The court finds that the deeds bringing the title down to the respondent were recorded immediately after their execution, and were constructive notice to the appellant. Conceding this, it makes the effort to mislead the appellant only the more apparent, but the doctrine of constructive notice has application only to a subsequent purchaser or encumbrancer, and can have no bearing on the question presented here.

The finding that the Pomona Land and Water Company notified the appellant that it repudiated the contract was immaterial, for the reason that that company never had any title to the property, and was not a party to the contract, or interested in it in any way.

Judgment and order reversed, with instructions to the court below to conform its conclusions of law to this opinion, and render judgment on the findings in favor of the plaintiff.

Rehearing denied.

ESTOPPEL. — As to what are the essentials of estoppel, see *Moyle v. Landers*, 78 Cal. 99; 12 Am. St. Rep. 22, and note 29; compare *Humphreys v. Finch*, 97 N. C. 303; 2 Am. St. Rep. 293, and note 296, as to principal's acts operating as an estoppel, being a ratification of an agent's acts under seal without authority.

SALES OF REAL ESTATE. — Ratification of Agent's Acts. — A principal may, by subsequent acts, ratify a sale of realty made by an agent without authority: *Harrison v. McMurray*, 71 Tex. 122; compare *Wheeler v. McGuire*, 86 Ala. 303.

SALES OF REAL ESTATE. — Oral Contracts. — An agent may be authorized by parol to enter into a written contract for his principal to convey realty; but a simple parol authority to sell will not authorize the agent to sign a written contract for his principal: *Milne v. Kleb*, 44 N. J. Eq. 378. There is no valid consideration where a vendee, upon a disaffirmance of a parol purchase of land, agrees, in consideration of being released from the purchase, to

surrender to the vendor certain property: *Shader v. Newby*, 85 Tenn. 248. A parol agreement to sell land, followed by possession, acted upon by both vendor and vendee, will not defeat vendor's claim for the purchase-money, because in violation of the statute of frauds: *Watson v. Baker*, 71 Tex. 730; compare *Stub v. Grimes*, 38 Minn. 317; *Outsinger v. Ballard*, 115 Ind. 92.

SALES OF REAL ESTATE. — Authority of Agents. — Leaving a description of property by the owner or his agent with a real estate broker, accompanied with a request to sell on certain terms at a price designated, is a sufficient authority to sell: *Long v. Herr*, 10 Col. 380. But mere authority to sell realty is not authority to execute a contract to convey: *Armstrong v. Lowe*, 76 Cal. 616. And authority to sell to a particular person on certain terms is not authority to sell at a different time on different terms to another person: *Graves v. Horton*, 38 Minn. 66. Authority to sell realty implies authority to do everything necessary to complete the contract and make it binding: *Smith v. Tate*, 82 Va. 657. A broker is entitled to his commission when he procures a purchaser with whom his principal is satisfied, and who actually contracts for the realty at a price satisfactory to the owner: *Cooking v. Krakauer*, 70 Tex. 735.

SALES OF REAL ESTATE. — Uncertainty in Contract. — A contract was bad for uncertainty in terms, where it referred to "securities for deferred payments," without specifying the kind or character of the securities: *George v. Conkaine*, 38 Minn. 238; compare *Quinn v. Champagne*, 38 Id. 322. A description of land by name in a contract of sale may be sufficient, if the boundaries are known and well defined: *Burnett v. Kullak*, 76 Cal. 535.

LACHES, WHAT IS, AND VALID EXCUSES THEREFOR: Note to *Bell v. Hudson*, 2 Am. St. Rep. 795-807.

[IN BANK.]

FRESNO CANAL COMPANY v. ROWELL.

[80 CALIFORNIA, 114.]

CONTRACT BY LAND-HOLDER, WHEN BINDS HIS GRANTEE. — If the owner of land agrees to take water for a definite period for the purpose of irrigating such land, and to pay therefor a specified price annually, and the agreement declares that it shall run with and bind the land, a subsequent grantee of the land, with notice of the agreement, is not personally bound by it, but it creates a lien on such land which may be enforced against it in the hands of any subsequent purchaser with notice thereof.

NOTICE OF TERMS OF AN AGREEMENT WHEREBY A WATER COMPANY HAD STIPULATED TO FURNISH AND THE LAND-OWNER TO PAY FOR WATER for irrigating land for a specified time will be imputed to a subsequent purchaser of such land, who, at the time of his purchase, knew that there was a water right connected with the land, and made no inquiry as to its terms. This knowledge made further inquiry a duty, and the failure to pursue such duty cannot relieve him from the obligation which proper inquiry would have revealed.

NOTICE. — RECORD OF AN AGREEMENT BETWEEN A WATER COMPANY AND THE LAND-OWNER, ACKNOWLEDGED BY THE LATTER ONLY, whereby the former agreed to supply and the latter to pay for water to be furnished

on such land, is notice of the contents of the agreement to all subsequent purchasers.

A COVENANT DOES NOT RUN WITH LAND UNLESS contained in a grant thereof, or of some estate therein.

ACTION to recover a judgment against defendant for water furnished his land, and to establish a lien upon the land, and for the foreclosure of the lien. The agreement under which plaintiff based its claim was one entered into the twentieth day of February, 1878, between defendant and Wendell Easton, then the owner of the land described in plaintiff's complaint. By this agreement, the plaintiff, as party of the first part, stipulated that it would furnish to Easton, the party of the second part, a certain amount of water for the purpose of irrigating his land until the 16th of February, 1921. Easton covenanted to take water during such time, and pay therefor a stated price annually. The agreement also contained the following provisions: "The water to be furnished under this agreement is intended to form a part of the appurtenances of said section or quarter-section of land, and the right thereto shall be transferable only with and run with said land, and that the party of the first part is bound by this instrument to all subsequent owners of said land, but to no other person." "It is covenanted that this agreement and the covenants therein contained on the part of the party of the second part shall run with and bind the land." The agreement, acknowledged by Easton alone, was duly recorded on the 26th of February, 1878. Thereafter Easton conveyed a portion of the land to the defendant in this action. Judgment having been entered in favor of the defendant, the plaintiff appealed therefrom, and from an order refusing it a new trial.

George E. Church, for the appellant.

Wharton and Short, for the respondent.

THORNTON, J. The contract binds Easton, but we cannot see it binds defendants personally. Rowell was no party to the contract, nor do we see that he ever agreed to bind himself personally for its performance.

Easton owned certain lands, and while owner made a contract in writing with plaintiff to furnish water for a certain period for a certain price, which Easton agreed to pay, and that his successors in interest should pay, annually, on certain days of the year.

He also covenanted that the contract and the covenants

therein contained on his part should "run with and bind the land."

A lien may be created on property by contract: Civ. Code, secs. 2881-2884. We think that there was a lien created by contract on Mr. Easton's land mentioned in the agreement. All the covenants in the agreement were agreed to bind the land. One covenant was to pay money afterward to become due. The language above quoted shows an intent by Easton, the owner of the lands, to create a lien on them. This makes a contract of lien.

This lien bound the land as against any person who succeeded to Easton's estate, with notice of it.

It seems to be conceded that defendant is the grantee or successor of Easton as to part of the lands above referred to.

The evidence tends to show that defendant had actual notice of the water right when he purchased the land. He testified that at that time he knew that there was a water right of plaintiff's connected with the land, but did not know its terms. It seems to us that such knowledge was sufficient to put him on inquiry as to the water right; that by pushing the inquiry he might have ascertained its exact condition, and that it was his duty to make the inquiry. Easton, or either of the officers of the plaintiff company, could have informed him of the right and its terms. He cannot by failure to inquire relieve himself of the obligation, which inquiry would have shown bound the land. He cannot be allowed to shut his eyes and say he did not see, when by opening them he might have seen.

But waiving the point of actual notice, we are of opinion that the notice by the record of the agreement was sufficient.

The written paper was such a paper as could by law be recorded, and impart notice to subsequent purchasers. All that was required was, that it should be properly acknowledged by Easton, the creator of the encumbrance on the land. The policy of the recording laws is, that the record should impart notice to subsequent purchasers or mortgagees of the grantor. The plaintiff had no interest in the land, and created no encumbrance on it. There could be no subsequent purchasers or mortgagees of the land from it. It was no more necessary that it should be acknowledged by it than that a mortgage should be acknowledged by the mortgagee. The plaintiff accepted the encumbrance created on the land, but did not create it or charge the land in any way.

Spect v. Gregg, 51 Cal. 198, is a direct authority on the point. The execution of the power of attorney by one of the constituents made the appointee his attorney. The instrument by its terms bore that the appointee should be the joint attorney of the four parties executing it, or severally, of each. The acknowledgment by one of the contestants created the appointee his attorney, and his acknowledgment was sufficient to authorize its recordation, and make the record notice as to any subsequent purchaser from him. So here, as to Easton, who, in fact, was the only creator of the encumbrance, and the only one who charged the land.

The fact that the defendant did not use the water, if the plaintiff complied with the contract, and this was found to be a fact, is immaterial. The land was then bound, whether the water was used or not.

It may be added that the covenants are not here regarded as covenants running with the land. They could not be such, because they are not contained in grants of the estate. Such is the manifest meaning of the statute, and such, we think, was the common law: Civ. Code, secs. 1460-1462, and the sections following in the title.

There can be no judgment against defendant personally for money, but the lien can be enforced by foreclosure against the land, and every grantee who is not a *bona fide* purchaser without notice.

Judgment and order reversed, and cause remanded for a new trial.

Rehearing denied.

COVENANTS. — A covenant by the owner of land to use or abstain from using it in such a manner as the other party to the contract specifies, will be enforced against the grantees of the original covenantor: *Hodge v. Sloan*, 107 N. Y. 244; 1 Am. St. Rep. 816, and note 822.

COVENANTS. — In an action upon a covenant, the only breach that can be set up as a ground of recovery must be a breach of some covenant contained in the writing upon which suit is brought: *Merriman v. Bush*, 116 Pa. St. 276. A mortgagor in possession is liable upon covenants which run with the land: *Trustees of Donations v. Streeter*, 64 N. H. 106. The grantee in a deed of conveyance cannot claim the benefits of any covenants in the deeds to those from whom he takes except those for quiet enjoyment and warranty, which run with the land: *Barry v. Guild*, 126 Ill. 439. Compare *St. Louis etc. R'y Co. v. O'Baugh*, 49 Ark. 418; *McAuley v. Harris*, 71 Tex. 631.

IN THE MATTER OF THE ESTATE OF FRANCISOA ACKERMAN, DECEASED.

[80 CALIFORNIA, 206.]

HOMESTEAD IN COMMUNITY PROPERTY VESTS ON THE DEATH OF A WIFE in her husband without administration, and subject to no other liability than such as has been created under the provisions of the law of homesteads. The death of one of the spouses does not in any way alter the estate or the character of the homestead.

PROBATE HOMESTEAD CANNOT BE SET APART OUT OF PROPERTY WHICH COULD NOT HAVE BEEN DEDICATED AS A HOMESTEAD immediately preceding the death of decedent.

PROBATE HOMESTEAD CANNOT BE SET ASIDE WHEN THERE EXISTS AT THE DEATH OF DECEDENT A HOMESTEAD DULY DEDICATED, though such homestead has been sold by the survivor before the application for the probate of the homestead is made.

Nagle and Nagle, for the appellant.

Stonehill and Payson, for the respondents.

FOX, J. Application by the surviving husband for an order setting apart to him a homestead out of the separate property of the estate of his deceased wife. The application was opposed by the heirs of deceased, and upon hearing of the matter, was denied. From the order denying such application, appeal is taken to this court.

From the findings, it appears that the lot which the court was asked to set apart to the surviving husband as a homestead was the separate property of the deceased wife. It was so inventoried by the applicant, who administered the estate, was appraised at the sum of two thousand one hundred dollars, and constitutes all the property of the estate; that no homestead had ever been declared thereon, and that no part of it had ever been occupied as a homestead or place of residence by the deceased or her husband during her lifetime; that she died September 17, 1885, leaving no children, father, or mother, but leaving her husband and a sister, Ysabel Morante, her next of kin and heirs at law.

It further appeared that for thirteen years before her death, deceased and her husband had occupied as a homestead and residence a dwelling-house and lot situate in another part of the city, and which was the community property of applicant and his deceased wife; that on the 5th of May, 1873, the deceased had duly executed and recorded a homestead on the lot so occupied by herself and husband, and the same had never been abandoned; that since the death of his said wife,

the applicant had sold the said last-named lot (the homestead aforesaid) for three thousand dollars, and appropriated the same to his own use, paying his debts existing at the time of the death of his said wife.

After the death of Mrs. Ackerman, her sister, Ysabel Morante, died, leaving a will, and leaving a husband and two children her heirs at law and devisees, who are the contestants here.

Under this state of facts, it is contended that under section 1401 of the Civil Code, immediately upon the death of the wife, the entire community property, without administration, went to the surviving husband. That is true, but so much of it as was at the time impressed with the character of homestead went to the survivor, not merely as community property, but as a homestead, subject to no other liability than such as existed or had been created under the provisions of the title on homesteads: Code Civ. Proc., sec. 1265. It was protected to the survivor of the family, in the same manner that it had been to the whole family, and was still a homestead: See also Code Civ. Proc., secs. 1474, 1475. The death of one of the spouses did not alter in any way the estate or character of the homestead: *Tyrrell v. Baldwin*, 78 Cal. 470. It required no action of the probate court to pass the homestead, protected as such. It passed immediately upon the death of one of the spouses, by operation of law: Code Civ. Proc., sec. 1265. If there had been administration affecting the estate out of which the homestead was carved, it would have become the duty of the probate court to set apart the recorded homestead to the survivor, but this setting apart would not have affected the right of the survivor. Such is not the purpose of the order in the case of a recorded homestead; its object and effect is simply to take the property out of administration: Code Civ. Proc., sec. 1465; *In re Orr*, 29 Cal. 101; *Rich v. Tubbs*, 41 Id. 34; *Schadt v. Heppe*, 45 Id. 434; *Estate of Burton*, 63 Id. 36; *Bolinger v. Manning*, 79 Id. 7. Having been selected from community property, immediately upon the death of either spouse it vested in the survivor: *Mawson v. Mawson*, 50 Id. 539; *Estate of Headen*, 52 Id. 295; *Gagliardo v. Dumont*, 54 Id. 496; *Herrold v. Reen*, 58 Id. 443.

Under the statute, no property can be set apart by the probate court as a homestead which might not have been dedicated as such under the homestead act immediately preceding the death of the deceased: *Kingsley v. Kingsley*, 39 Cal. 666;

Estate of Noah, 73 Cal. 590; 2 Am. St. Rep. 834. At and for a long time prior to the death of the decedent, the parties had a duly dedicated and selected homestead, carved out of the community property. No other property could, therefore, have been dedicated by them, or either of them, to the purposes of a homestead immediately preceding the death of the wife. Upon her death, the dedicated and recorded homestead vested, *eo instanti*, as such, in the surviving husband. He was not then entitled to select another, even out of the community property, much less out of her separate estate. He has had the full benefit of that homestead, and the law will not now permit him to deprive the minor children of his deceased sister-in-law of their moiety of inheritance in the estate of his deceased wife by having that estate also set apart to him as a homestead. The court below was correct in denying the application, and the order is affirmed.

Hearing in bank denied.

HOMESTEAD. — The court cannot set apart a homestead to a surviving husband or wife in property which could not have been selected as such during the continuance of the marriage: *Estate of Noah*, 73 Cal. 590; 2 Am. St. Rep. 834.

HOMESTEAD. — A widow whose husband owed no debts at his decease cannot claim a continuance of the homestead which was set apart in his lifetime: *Barber v. Jenkins*, 84 Va. 895. A homestead acquired by and vested in a husband during his wife's lifetime is not lost upon his being left wholly without a family by reason of her death: *Bank v. Shelton*, 87 Tenn. 393. A surviving husband can sell the homestead to pay community debts: *Fagan v. McWhirter*, 71 Tex. 567.

[IN BANK.]

PEOPLE v. DUNN.

[80 CALIFORNIA, 211.]

STATUTE, ENACTMENT OF. — IT NEED NOT AFFIRMATIVELY APPEAR FROM THE JOURNALS OF THE TWO HOUSES OF THE LEGISLATURE that every act required to be done in the enactment of a law has been done. Therefore, a statute cannot be avoided by proving that such journals failed to mention some act which the constitution commands to be done in its enactment.

DELEGATION OF LEGISLATIVE POWER. — A STATUTE PROVIDING THAT CERTAIN PERSONS SHALL SELECT A SITE for a public building proposed to be constructed is not an unlawful delegation of public powers. The mere act of selecting such site is not legislative.

CONSTITUTIONAL LAW. — ACT APPROPRIATING MONIES FOR THE PURCHASE OF LAND to be used as a home for feeble-minded children, and for the

erection of buildings thereon, and for the construction of fences and other improvements, does not violate a provision of the constitution inhibiting the passage of any law, other than a general appropriation bill, containing more than one item of appropriation for more than one single purpose.

Haggin, Van Ness, and Dibble, for the petitioner.

T. H. Laine, for the respondent.

WORKS, J. This is an application for a writ of *mandamus* to compel the respondent, as controller of state, to issue his warrant for certain moneys which the relators claim should be paid out of the appropriation contained in the act of the legislature, entitled "An act to provide a permanent site for the California Home for the Care and Training of Feeble-minded Children, to erect suitable buildings thereon, and making an appropriation therefor": Stats. 1889, p. 69.

The respondent resists the claim of the petitioners, on the ground that the said statute is unconstitutional and void, for five reasons, set forth in his return to the alternative writ, as follows:—

"1. Said bill was not read on three several days in the senate prior to its final passage, nor was it declared to be a case of urgency.

"2. Said alleged law was introduced, known in its various stages in the legislature, and passed as senate bill No. 194, which said bill was put upon its final passage in the assembly after it had been amended in its title, and in all its sections save section 5, and before and without being printed with the amendments thereto for the use of the members, in violation of article 1, section 15, of the constitution of this state.

"3. Said bill was not read at length upon its final passage, in violation of article 1, section 15, of the constitution of this state.

"4. Said bill or law is void, as it delegates legislative powers and functions to a board of trustees aided by two citizens, the two bodies forming a commission clothed with legislative powers and functions.

"5. Said bill or law is void on its face. It is not a general appropriation bill, and does contain more than one item of appropriation, and that for more than one single and certain purpose, wherefor the respondent prays that the writ be discharged, and that he go hence with his cost."

The claim of the respondent is, that the journals of the two houses of the legislature do not show affirmatively that

the bill was read three several times in the senate, that it was printed with its amendments before its final passage, or that it was read at length upon its final passage, as required by the constitution: Art. 1, sec. 1; and art. 4, sec. 15.

The point made and relied upon is, that it must affirmatively appear from the journals of the two houses that every act required to be done in the enactment of a law has been done, and that in the absence of such a showing, it must be presumed that such acts were not done.

In support of this contention counsel cite Constitution, art. 4, secs. 10, 15, 16, 28; art. 18, sec. 1; Pol. Code, secs. 240, 256, 257; *Gardner v. Barney*, 6 Wall. 499; *Santa Clara Railroad Tax Case*, 9 Saw. 226, 227; *Spangler v. Jacoby*, 14 Ill. 298; 58 Am. Dec. 571; *Weill v. Kenfield*, 54 Cal. 111; *Oakland Paving Co. v. Hilton*, 69 Cal. 481; *Indiana Central R. R. Co. v. Potts*, 7 Ind. 681; *Madison v. Baker*, 80 Id. 374.

The case does not present the question as to the power of this court to go behind the enrolled bill in order to determine from the journals of the two houses whether the bill was properly passed or not. The respondent does not stop with the contention that the journals may be looked to in order to determine this question. His position is, that as the two houses of the legislature are required to keep journals of their proceedings, every act not shown by such journals to have taken place must be presumed not to have been done. His position cannot be upheld by reason or authority. It is uniformly repudiated even in those states in which it is held that the journals may be looked to as against the enrolled bill: *Larrison v. Peoria etc. R. R. Co.*, 77 Ill. 11; *Cooley's Constitutional Limitations*, 164; *Minnesota v. City of Hastings*, 24 Minn. 78; *Miller v. State*, 3 Ohio St. 476; *Illinois v. Illinois Central R. R. Co.*, 33 Fed. Rep. 760. For these reasons we think the objections to the law, on the ground that it was not legally passed, are not well taken.

Nor do we think there is any force in the objection that, by providing that certain persons should select the site for the building proposed to be constructed, the act attempted to delegate legislative functions and powers. To hold that such a power could not be vested in persons named in the act, would be an unreasonably strict application of the rule that legislative functions cannot be delegated. The mere act of selecting a site to be purchased was not a legislative act: *State v. Chicago etc. R'y Co.*, 38 Minn. 281.

The last objection, viz., that the bill is not a general appropriation bill, and contains more than one item of appropriation for more than one single purpose, is equally groundless. There is but one appropriation in the act for one purpose. The object and purpose of the appropriation is to supply a permanent location for a home for feeble-minded children. It was not necessary that there should have been a separate appropriation for the purchase of the land, another for the erection of the building, another for the construction of fences, and another for each improvement necessary to the proper completion of the proposed work. Section 34, article 4, of the constitution, which is relied upon to support this objection to the law, cannot be given any such unreasonable construction.

The relators are entitled to a peremptory writ, as prayed for, and the same will be issued.

THORNTON, J. (concurring).—I concur. The first, second, and third reasons given to maintain the respondent's contention that the act of the legislature referred to in the foregoing opinion is unconstitutional, are, in my judgment, correctly disposed of adversely to such contention in the case of *Supervisors of Schuyler County v. People*, 25 Ill. 181 (163). The case cited arose under the constitution of Illinois, which, as regards the matter under consideration, is similar to the constitution of this state.

It was urged in that case that the senate journal did not show that the bill was read three times in that body before it was put on its final passage, and that hence the constitutional requirements to make it a law were not observed. On this point the court said: "The constitution does require that every bill shall be read three times in each branch of the general assembly before it shall be passed into a law, but the constitution does not say that these several readings shall be entered on the journals. Some acts performed in the passage of laws are required by the constitution to be entered on the journals in order to make them valid, and among these are the entries of the ayes and nays on the final passage of every bill; and we held in the case of *Spangler v. Jacoby*, 14 Ill. 297, 58 Am. Dec. 571, that where the journal did not show this, the act never became a law. But where the constitution is silent as to whether a particular act which is required to be performed shall be entered on the journals, it is then left to the discretion of either house to enter it or not, and the silence

of the journal on the subject ought not to be held to afford evidence that the act was not done. In such a case, we must presume it was done, unless the journal affirmatively shows that it was not done."

The constitution of this state does not require that the three several readings of a bill, to pass it into a law, shall be entered on the journal of either house. From the silence of the journals in this matter, we are not authorized to infer that the constitutional requirement was not observed. The only evidence that can be regarded to show that the requirement was disregarded should be an affirmative statement to that effect in the journal. In the absence of evidence of this character, we must presume that the duty imposed by the constitution was performed.

The above rule applies to each of the three reasons for respondent's contention above referred to.

CONSTITUTIONAL LAW. — A judge cannot delegate his authority to another; nor can the legislature or any other power delegate it for him: *State v. Noble*, 118 Ind. 350; 10 Am. St. Rep. 143. The legislature cannot delegate its powers to any other body: *Ex parte McNulty*, 77 Cal. 164; 11 Am. St. Rep. 257.

CONSTITUTIONAL LAW — JOURNALS. — An amendment to the constitution need not be copied in full upon the journals of the senate and assembly: *Oakland P. Co. v. Tompkins*, 72 Cal. 5; 1 Am. St. Rep. 17, and note 21, 22; as to entering constitutional amendments in the journals of the legislature, compare *State v. Tully*, 19 Nev. 391; 3 Am. St. Rep. 895. The journals of the two houses of the general assembly are public records, to which the court may look, and are the proper evidence of the passage of a bill over the governor's veto: *State v. Denny*, 118 Ind. 449.

[IN BANK.]

PEOPLE v. FREEMAN.

[80 CALIFORNIA, 288.]

POWER OF APPOINTMENT TO OFFICE IS NOT ESSENTIALLY AN EXECUTIVE FUNCTION. It may, therefore, be regulated by law, and if the law so provides, may be exercised by the members of the legislature. Hence, a statute authorizing an election of trustees of a state library by the legislature in joint convention assembled is constitutional.

Johnson, attorney-general, and Henry C. Dibble, for the appellant.

A. C. Freeman, in pro. per., for the respondent.

BEATTY, C. J. By section 2292 of the Political Code, it is provided as follows: "The state library is under the control of a board of trustees, consisting of five members elected by the legislature in joint convention assembled, and holding their offices for the term of four years."

Under and in pursuance of this provision of the code, the legislature, in joint convention, elected the respondent a member of said board of trustees, and he thereupon assumed, and has since exercised, the duties of the office.

The relator, holding that the above-quoted provision of the Political Code is unconstitutional in so far as it attempts to confer upon a joint convention of the senate and assembly the power of appointment to the office in question, has instituted this proceeding for the purpose of ousting the respondent.

The contention on the part of the relator is, that appointing to office is intrinsically, essentially, and exclusively an executive function, and therefore cannot be exercised by the legislature.

Section 1 of article 3 of the constitution of 1879 provides: "The powers of the government of the state of California shall be divided into three separate departments: the legislative, executive, and judicial; and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others, except as in this constitution expressly directed or permitted."

If the making of appointments to office is a function which, in the sense of the constitution, appertains to the executive department of the state government, there would seem to be no escape from the conclusion that the appointment of the respondent by the members of the legislative department was invalid, unless, by some specific provision of the constitution, such appointment is expressly directed or permitted.

On the part of the respondent, it is contended that such specific provision is found in section 4 of article 20, which reads as follows:—

"SEC. 4. All officers or commissioners whose election or appointment is not provided for by this constitution, and all officers or commissioners whose offices or duties may hereafter be created by law, shall be elected by the people, or appointed, as the legislature may direct."

But we cannot construe this section as an express direction or permission to the legislature to exercise the power of ap-

pointment to office, if that is essentially an executive function. It would, upon such an assumption, amount only to this: that, with respect to newly created offices, or offices not provided for in the constitution, the legislature may direct whether they shall be filled by popular election or by executive appointment; in other words, that the legislature may prescribe the rule of selection, but may not itself make the selection: *State v. Kennon*, 7 Ohio St. (547) 561. Our decision, therefore, must depend upon the solution of the question whether appointment to office is essentially an executive function. As to this point, the authorities cited by counsel are meager and conflicting.

In the case of *Taylor v. Commonwealth*, 3 J. J. Marsh. 404, the court of appeals of Kentucky held that the removal of a county clerk and the appointment of another in his place by the county court could not be reviewed on writ of error, because such removal and appointment, though made in pursuance of authority delegated to the court as such by the constitution, was essentially an executive and not a judicial act.

In the case of *Field v. People*, 2 Scam. 80, and *Hoke v. Henderson*, 4 Dev. 1, 25 Am. Dec. 677, the question was not involved, and of course was not decided, although incidentally discussed. In a dissenting opinion in the Illinois case, a letter of Thomas Jefferson is quoted (p. 141), in which he says: "Nomination to office is an executive function; to give it to the legislature, as we do, is a violation of the principle of the separation of powers; it swerves members from correctness by temptation to entreat for office for themselves and to a corrupt barter for votes, and destroys responsibility by dividing it among a multitude. By leaving nomination in its proper place, among executive functions, the principle of the distribution of powers is preserved, and responsibility weighs with its heaviest force upon a single head."

To the same effect is the decision above cited from 7 Ohio St. 561.

No doubt these views as to the intrinsic nature of the power of appointment or of nomination to office, and the expediency of confining it to the executive department of the government, are entitled to the highest consideration, but the question here is, not what the constitution ought to be, but what it is, or in other words, what was the intention of its framers as to this particular matter. Of course, if there had been at the time of

its adoption a general *consensus* of opinion in harmony with the views of Mr. Jefferson, as above quoted, we should be forced to conclude that its framers intended to forbid to the legislature the exercise of the power of appointment to office. But there was no such *consensus* of opinion. On the contrary, it had not only been decided in other states of the Union, under constitutions containing provisions substantially equivalent to the sections above quoted from our own, that the legislature could fill offices by itself created, but our own supreme court, construing identical provisions of our old constitution, had come to the same conclusion: *People v. Langdon*, 8 Cal. 16. In view of this construction, so long acquiesced in and acted upon, it must be held that the convention of 1879, in readopting the provisions so construed, in the identical terms of the old constitution, intended that they should have the same operation and effect formerly attributed to them. If they had meant to prescribe a different rule, it would have been easy to express such intention in language not to be misunderstood, and leaving nothing to construction.

Upon these considerations we feel constrained to hold that the power of appointment to office, so far as it is not regulated by express provisions of the constitution, may be regulated by law, and if the law so prescribes, may be exercised by the members of the legislature.

Judgment affirmed.

THE PRINCIPAL CASE is one of several which have recently arisen in which the executive department of the state has resisted a supposed encroachment, and has claimed to be the sole constitutional depository of powers exercised by the legislature. In all the states the powers of government have been classified into legislative, executive, and judicial, and in all, or nearly all, persons charged with duties pertaining to one of these departments are forbidden to exercise any power or duty belonging to another, except in those cases where the constitution has, in direct terms, committed to the same officer functions belonging to two or more of these great departments.

If the function of appointing to office is clearly executive, then its exercise must be restricted to that department, unless the constitution of the state has permitted it to be exercised by the legislature. The constitution of the state of New York declared that "all other officers whose election or appointment is not provided for by this constitution, and all officers whose offices may hereafter be created by law, shall be elected by the people, or appointed, as the legislature may direct." The present constitution of California, as well as the constitutions of several other states, contains a clause substantially identical with that just quoted from the constitution of New York. It has been contended, and we think correctly, that this constitutional provision, in itself, is sufficient to authorize the legislature to provide the method by which persons shall be appointed to office; to either confer this power

upon or to withhold it from the executive department; and furthermore, that the legislature may vest the power of appointment in such persons or boards as it may deem prudent, including the members of the legislature themselves. In the case of *Sturgis v. Spofford*, 45 N. Y. 446, it appeared that a statute of that state had provided that three commissioners of pilots should be elected by members of the chambers of commerce, and the other two by the president and vice-president of the marine insurance companies, of the city of New York, represented by the board of underwriters of said city. This statute was resisted as unconstitutional, upon the ground that the legislature had no right to provide for an election of the officers in question, otherwise than by the ordinary mode of voting by the people. The court of appeals, however, declared that the mode prescribed by statute for selecting these officers was in legal effect an appointment, and came within the meaning of that word as used in the constitution. "Commissioners of pilots," said the court, "are officers whose offices were created by the legislature since the adoption of the constitution, and by the language of the section they must be either elected by the people, or appointed, as the legislature may direct. It is insisted that the power of appointment can only be conferred upon some body or officer representing or responsible to the people. The language of the constitution does not justify this position. The power is not restricted. I agree that express limitations are not necessary, but they may be implied. The provision for organizing the executive, legislative, and judicial departments of the government exclude any other mode as effectually as if negative words were used, and so of any other provisions. Legislation inconsistent with affirmative provisions of the constitution cannot be tolerated. Otherwise, that instrument might be subverted by indirection. The principle has no application in this case. County, city, village, and town officers, whose election or appointment is not provided for in the constitution, are directed to be appointed by section 2 in a certain specified manner, but the framers of the constitution carefully omitted any direction in the next clause of the section as to the manner of appointment of officers whose offices should be thereafter created. The omission of any direction as to the appointment of such officers is significant of the intention of the framers and the people to leave the unrestricted power in the legislature. The inconsistency with the mode prescribed for appointing or electing the enumerated officers is one authorized by the express provision of the constitution itself. These are neither county, city, village, or town officers, but are officers of the state, and relate to the exercise of national power in protecting commerce and providing means for averting the dangers of ocean navigation. The power has been conferred upon Congress, but until its exercise by that body each state exercises it for itself."

The legislature represents the whole power and authority of the people, except when they have withheld or limited such power, or have conferred it upon some other department. "In creating a legislative department and conferring upon it legislative power, the people must be understood to have conferred the full and complete power, as it rests in and may be exercised by the sovereign power of any country, subject only to such restrictions as they may see fit to impose, and to the limitations which are contained in the constitution of the United States. The legislative department is not made a special agency for the exercise of specially defined legislative powers, but is intrusted with general authority to make laws at discretion": Cooley's Constitutional Limitations, 87. Undoubtedly the people, being the sovereign power in every republican form of government, may make laws in such modes

and at such times as they may see proper. But the people do not act directly, but by the legislature. They have granted the legislature power to do for them whatever they might otherwise do for themselves, except when they have by the constitution withheld this power. The legislature, acting for the people, may therefore provide for officials not otherwise provided for in the constitution, and may, we think, choose officials directly, or in any other mode not prohibited by the constitution.

The court in the principal case was, however, of the opinion that the clause of the state constitution heretofore quoted could not be relied upon as authorizing the legislature to confer upon itself the power to appoint or elect to office, if such power was essentially executive; and it hesitated to subscribe to the principle that such power ought, if the question were a new one, to be regarded as other than executive, but as it was also unwilling to overrule the previous decisions on the subject, it yielded them an apparently reluctant assent, and held the statute in question to be constitutional.

It remains for us to direct attention to the authorities to which the court resorted in the principal case, and which affirm that appointment to office is not so essentially an executive power that it may not be taken from the executive or exercised by the legislature. "The legislature has the undoubted power in this state to appoint officers within a city, such as laying out streets and assessing the damages and benefits arising to the property taken for that purpose. There is nothing in the state constitution that directly or by implication forbids it, and it is not an extraordinary or improper exercise of legislative power that conflicts with the principles of our state government": *Daley v. City of St. Paul*, 7 Minn. 396.

In New Jersey, when by legislative action commissioners were appointed to survey and map the lands of a certain township, and to open streets for public use, and make compensation therefor, and the authority of the legislature to make such appointments was questioned, the supreme court of errors and appeals said: "There are no reasons assigned that are sufficient against the power of the legislature to appoint these commissioners with the duties and authority given them. They, in effect, take the place of surveyors of the highways and overseers of roads; and map and lay down many roads at a time, instead of one, in anticipation of future necessities. It is, in principle, the ordinary delegation of legislative authority to choose public officers who do these necessary and subordinate acts of administration. They are municipal officers selected by the legislature instead of by the people, which, however questionable the method may be in policy, is frequently exercised, and can hardly be doubted, within certain necessary limitations": *State v. Seymour*, 35 N. J. L. 54.

Judge Christianity, speaking of the power of the legislature to make the appointment of members of the board of public works at Detroit, said: "The constitution does not seem to have made any clear distinction between the 'election' and the 'appointment' of officers; and in section 18, article 4, the terms seem to be used as synonymous, and what is usually and more properly termed the 'election' of a senator is there designated as an 'appointment'; but in section 14, article 15, above quoted, a distinction seems to have been recognized, though not defined. And though when the legislature in joint convention proceeded directly to vote for officers under the provisions of the constitution, or of any law for that purpose, this mode of selecting the officer might properly be called an election; yet when, as in this case, the selection consists, not in voting directly for the persons who are to fill the office, but in filling the blanks in a bill, in the course of its passage through

the respective houses, with the name of the persons who are declared to be such officers, it must, I think, be conceded that this is more in the nature of an appointment than of an election. The vote is taken in the same manner as in filling any other blank in the bill. It should, therefore, I think, be treated as an appointment, and not as an election. There is nothing in the constitution expressly authorizing the legislature to make such an appointment of these officers (nor to elect them if it be held to be an election). And the first and most general objection to the act is, that this mode of appointing or selecting the officers named in the act is not an exercise of legislative, but of executive, power; that legislative power is, in its nature and essence, the power of prescribing rules of action, or regulations for the government of officers, of public boards, of courts and individuals, — and not of selecting particular individuals by name, deciding upon their respective merits or rights, or making special enactments in reference to individuals, not in the nature of rules or regulations; that to direct the time and mode in which an appointment shall be made, and by whom, is an exercise of legislative power; but that the making of such appointment in pursuance of such direction is essentially the exercise of a power in its nature executive. The effect of this position, if correct, would be to render the appointment in the present case void, whether section 14, article 15, forbids it or not; since, if the legislature have the power, it is in virtue of the grant of legislative powers given them by the constitution; and we shall, therefore, dispose of this question before proceeding to discuss the effects of section 14, above alluded to.

"This view of the nature of legislative power, as urged by the counsel for the respondents, struck me at first with considerable force; but reflection and further examination have satisfied me that, though true as to the great mass of legislative power, — that which is most broadly distinguished from both judicial and executive, — yet it does not include the whole field of what is generally recognized as legislative power, not only in England, but in the most of the states of the Union. Besides the power to make general rules for the government of officers and persons, and regulating the rights of classes of persons or of the whole community, there is a large class of powers recognized as legislative, occupying an intermediate space between those general rules and regulations and those of a judicial character on the one side, and the executive on the other, and which are not, and cannot be, marked off from these by any clear and palpable line.

"Such commissioners are, I think, public officers within the meaning of the constitution. And as the legislature represents the public interest, and has full control of all municipal organizations as instrumentalities of government, I see no reason to doubt their power of creating such offices as they may think the public interest requires, or of filling them with such persons as they may choose to designate in the act, except as that power is restrained by some provision of the constitution. This course of legislation may not be wise or politic; but as a question of power, I think the legislature possesses it, with the limitations above mentioned.

"As to this mode of appointment being the exercise of a power essentially executive in its nature, it is sufficient to say that executive power cannot always be defined by any fixed standard in the abstract. What would come within the executive power in our form of government would fall within the legislative in another, and *vice versa*. The question here is, whether, under our constitution, it is executive or legislative; and as the constitution has not confided the appointment of these or of the like officers to the executive authorities, and has left it to the legislative discretion whether to

create such offices, and how they shall be filled, it cannot be truly said that such an appointment is any more in the nature of the exercise of an executive than of a legislative power": *People v. Harlibut*, 24 Mich. 44.

In discussing the same subject in *People v. Langdon*, 8 Cal. 15, Judge Murray, delivering the opinion of the court, used the following language: "The appellant contends that, under the third article, and the sixth section of the eleventh article, of the constitution, the legislature have no power to elect an incumbent to an office. The third article provides for the distribution of the powers of government between the executive, legislative, and judicial branches of the government, and forbids those charged with duties belonging to one from exercising functions belonging to another department. Under this provision, it is urged that the legislature may create the office, but cannot elect the officer; that it would be exercising powers belonging to the executive branch of the government or to the people. Unhappily for the argument, there is no fourth branch of the government recognized by the third article of the constitution, which is represented by the people, and if there is any encroachment upon any other department, it must be upon the executive. The power to fill an office is political, and this power is exercised in common by the legislatures, the governors, and other executive officers of every state in the Union, unless it has been expressly withdrawn by the organic law of the state. That it has not been by our constitution, there can be no doubt, — 1. Because there is no clause which would warrant such a construction; and 2. Because there are several which forbid it."

The precise question now under consideration was also decided in *Mayor of Baltimore v. State*, 15 Md. 376; 74 Am. Dec. 572. The remarks of the court upon this topic were as follows: "At the very threshold the relators are met with the objection that the law is radically void, because the legislature had no power to appoint the commissioners named in the act. It is plain that this point, if well taken, strikes down the law at one blow, because, if not validly appointed, they cannot proceed to put it in force, and all other instrumentalities must fail. But if the legislature had power to make the appointment, we cannot say that it ought not to have been exercised, any more than we could, with propriety, pass upon the correctness of its judgment in selecting these officers. It is a mere question of legislative power, and as such alone can we treat it. It is contended that the power of appointment being an intrinsic executive function, the naming of the commissioners in the law was in violation of the sixth article of the declaration of rights, that the legislative, executive, and judicial powers of government ought to be forever separate and distinct from each other, and no person exercising the functions of one of said departments shall assume or discharge the duties of any other. We are not prepared to admit that the power of appointment to office is a function intrinsically executive in the sense in which we understand the position to have been taken, namely, that it is inherent in, and necessarily belongs to, the executive department. Under some forms of government it may be so regarded, but the reason does not apply to our system of checks and balances in the distribution of powers, where the people are the source and fountain of government, exerting their will after the manner, and by instrumentalities, specially provided in the constitution."

In harmony with the foregoing decisions are *People v. Fitch*, 1 Cal. 536; *Ross v. Whitman*, 6 Id. 364; *Davis v. State*, 7 Md. 161; *People v. Tilton*, 37 Cal. 525; *In re Bulger*, 45 Id. 555; *State v. Constantine*, 42 Ohio St. 441; *Peo-*

ple v. Woodruff, 32 N. Y. 364; *People v. Provinces*, 34 Cal. 540; *People v. Draper*, 15 N. Y. 532.

The truth is, that the power of appointing or electing to office does not necessarily and ordinarily belong to either the legislative, the executive, or the judicial department. It is commonly exercised by the people, but the legislature may, as the law-making power, when not restrained by the constitution, provide for its exercise by either department of the government, or by any person or association of persons whom it may choose to designate for that purpose. It is an executive function when the law has committed it to the executive, a legislative function when the law has committed it to the legislature, and a judicial function, or at least a function of a judge, when the law has committed it to any member or members of the judiciary. The legislature, unless inhibited by the constitution, may exercise its power in either of three modes: 1. It may, by a statute, create an office, and name persons who are to fill it: *State v. Seymour*, 35 N. J. L. 48; *Daley v. St. Paul*, 7 Minn. 390; *Mayor of Baltimore v. State*, 13 Md. 376; 74 Am. Dec. 572. 2. It may by law create an office and provide that it shall be filled by election or appointment by the legislature in joint convention assembled: *People v. Langdon*, 8 Cal. 1; *People v. Fitch*, 1 Id. 536; and the principal case. 3. It may, after creating an office, provide that it may be filled by appointment made by any person or by the members of any voluntary association, as by the members of the chamber of commerce and the presidents and vice-presidents of the marine insurance companies of a certain city, or by the members of the board of underwriters of such city; nor is it necessary that the persons thus designated be citizens of the United States and authorized to vote as such: *Sturges v. Spofford*, 45 N. Y. 446; *In re Bulger*, 45 Cal. 556.

The constitution of Ohio declares that "no appointing power shall be exercised by the general assembly except as prescribed in this constitution, and in the election of United States senators." While this constitutional inhibition was in force, two statutes were enacted, one of which provided for a board denominated the commissioners of the state-house, to be composed of three persons to be appointed by three other persons specifically named in the statute. The second statute provided that there should be appointed by three persons named therein, and who are the same persons named in the first statute, three directors of the Ohio penitentiary. By each statute the persons therein named were given authority to fill vacancies which might thereafter, from any cause, occur in the boards appointed by them, and, by the last statute, authority was given to remove for cause any one of the directors of the penitentiary so appointed. An information in the nature of a *quo warranto* was filed against these three persons named in such statutes for exercising the powers therein attempted to be conferred. As a result of these proceedings, the supreme court of the state determined that while the statutes carefully avoided designating these persons as officials, yet as the functions which they were authorized to perform were official in their nature, the acts of the legislature in question were exercises of the appointing power, and as such forbidden by the constitution. "The official or unofficial character of the defendants," said the court, "is to be determined, not by their name, nor by the presence or absence of an official designation, but by the nature of the functions devolved upon them. If the general assembly had in terms enacted 'that a board of commissioners of the appointing power, to consist of three members, be and is hereby constituted, and that William Kennon, Asahel Medbery, and William B. Caldwell be and hereby are respectively appointed to the office of member of such board,' and had then

preceded to clothe them with precisely the same powers and charge them with the same public trusts which are committed to them by the terms of the acts quoted, we presume no one would deny that they would be officers, if the act was one of constitutional validity. Certainly they would then be called officers, and would have an official name. Yet, if we look at the substance of things, where is the difference between the actual enactment and the one supposed? There is none whatever. Surely these men are not mere private electors; they are something more, — much more; and the mere fact that their functions are nameless cannot alter the case.

"But it is said the acts referred to prescribe no oath of office, and it is thence inferred that the defendants cannot be officers. To this it may be replied that the constitution does prescribe an oath of office, and that its injunctions are as obligatory as those of a statute could be. At all events, the utmost that such omission can effect is to show an instance of legislative neglect or oversight. That the defendants ought to have taken an oath of office before entering upon the discharge of official duty, is clear.

"Again, it is said that no fees, salary, or other compensation, is annexed to the discharge of the duties devolved by statute upon these defendants. This is true; and it is also true that compensation to them hereafter is no where by these statutes prohibited or precluded. That they shall not hereafter receive any compensation for services by them rendered and expenses incurred under those acts, is no where made a condition of their acceptance of the trusts reposed in them. There is nothing to prevent their applying to the legislature for compensation, nor to prevent the legislature from awarding it. Indeed, upon every principle of general equity or morality on which legislative bodies are accustomed to proceed, in the allowance of claims against the state, if this legislation were valid, they ought to receive a fair compensation for their time and expenses.

"That compensation or emolument is a usual incident to office is well known; but that it is a necessary element in the constitution of an office is not true. It is not named in either of the definitions above referred to, and if it had been, facts would show the contrary. George Washington not only received no pay as commander-in-chief of the continental armies during the war of our Revolution, but accepted the position on the express condition prescribed by himself that he should receive none: 7 Bancroft, 401, 402. The members of the British Parliament do not receive, and for more than a century have not received, any pay whatever: 1 Bla. Com. 174, note 42. And it will hardly be contended that these are not offices.

"How far the general assembly may go in constituting temporary agencies and commissions for temporary, incidental, transient, or occasional purposes, and in designating the persons who are to execute them, without thereby creating an office, and appointing an officer, are not questions before us. The question which is before us imposes responsibilities sufficiently onerous; and we wish to confine ourselves to it alone. But we are clear that if this legislation is valid, then these defendants are officers, — the holders of office, — and having been appointed by the general assembly, and their appointment being an 'exercise of the appointing power by the general assembly,' their appointment is unconstitutional and void, unless their appointment by the general assembly is 'prescribed by the constitution,' and they are thus brought within the exception to the general prohibition": *State v. Kinnon*, 7 Ohio St. 547.

In the state of Indiana, the right of the legislature to exercise a power of appointing to office has been recently subjected to frequent judicial contests,

the result of which is somewhat doubtful. In the case of *State v. Denny*, 118 Ind. 382, it appeared that a statute had been enacted to establish an efficient board of public works and affairs in all the cities of fifty thousand inhabitants or more. The statute, after discussing the duties of such board, provides that it must consist of three members selected from the two leading political parties by a joint vote of the majority of the general assembly of the state. Three different judges expressed their views regarding the constitutionality of this statute. Judge Coffey was evidently of the opinion that an appointment to an office not appertaining to the legislative nor the judicial department was the exercise of an executive function, and therefore inhibited to the legislature by virtue of the distribution of the powers of governing into the three great departments. Chief Justice Elliott, while he concurred in the judgment of the court pronouncing the statute unconstitutional, evidently rested his information chiefly upon the ground that it was an invasion of the rights of local or municipal government. Judge Mitchell, dissenting from the opinion of the other judges, regarded the statute as constitutional. Whether the other judges who concurred in pronouncing the statute unconstitutional did so for the reasons stated by Judge Coffey, or those urged by Judge Elliott, does not appear.

On the same day on which the case last cited was determined, the same court decided *City of Evansville v. State*, 118 Ind. 427, involving similar questions. The statute considered in that case was one providing for a board of metropolitan police and fire department in all cities of the state of twenty-nine thousand or more inhabitants, the members of which board were to be elected by the general assembly. This act was also pronounced unconstitutional upon several grounds. Judge Berkshire wrote an opinion, in the general conclusions of which Chief Justice Elliott concurred, and Judge Mitchell dissented as before. That part of the opinion of Judge Berkshire relating to the question now under consideration is as follows:—

“Except so far as an efficient police department goes, which is for the protection of the public at large, the people of the state are not interested in any of the matters to which the said act of the legislature relates, but the citizens of Evansville and Indianapolis, the two cities to which the act applies, are alone interested. It therefore becomes a question whether or not the legislature may take from the people of these two cities the right of local self-government, the right to manage and control their own purely local affairs in their own way, and place the management of all such local affairs under state control. We do not believe that the legislature has any such power. Before written constitutions, the people possessed the power of local self-government. It is conceded that the people of Indiana originally possessed all governmental power, and it will not be questioned but that they still possess such of that power as has not been delegated. All the power which the people have delegated is what has passed from them by the constitution: Pomeroy's Constitutional Law, 9th ed., see title Centralization and Local Self-government, secs. 151 et seq.; 1 Dillon on Municipal Corporations, 3d ed., sec. 9; Cooley's Constitutional Limitations, 5th ed., 225; *People v. Huribut*, 24 Mich. 44; *People v. Detroit Common Council*, 28 Id. 228; 15 Am. Rep. 202; *People v. Mayor*, 51 Ill. 17; *People v. Lynch*, 51 Cal. 15; 21 Am. Rep. 677; *People v. Albertson*, 55 N. Y. 50; *People v. Porter*, 90 Id. 68.

“The statute in question is a very remarkable statute, to say the least of it, and if it became necessary, it would be a question for serious consideration whether it ought not to be held unconstitutional upon the ground that

it is contrary to natural justice and equity: See *Pumpelly v. Village of Owego*, 45 How. Pr. 219, 246; *Bradshaw v. Rodgers*, 20 Johns. 103. Many other cases might be cited. We quote the following from *Atkins v. Town of Randolph*, 31 Vt. 236: 'This view seems to be fully recognized and embodied in the learned and elaborate opinion drawn up by Isham, J., in the case of *Montpelier v. East Montpelier*, 29 Id. 12; 67 Am. Dec. 748. That case, moreover, as well as *Bowdoinham v. Richmond*, 6 Greenl. 112, 19 Am. Dec. 197, demonstrates that some things are beyond the scope of legitimate legislation, as affecting municipal corporations, a doctrine entirely at variance with the idea of the illimitable supremacy of the law-making power over such corporations. The language of Hutchinson, J., in *Poultney v. Wells*, 1 Aiken, 180, embodying the principle upon which the decision of that case was rested, is comprehensive, and to the point. He says: "The court are unanimous in the opinion that the school right, thus appropriated by the charter, belongs to the town of Wells, so that the legislature can exercise no power over it to vary its appropriation, without the consent of the town, and this consent must be by those who are inhabitants of the town at the time the assent is given": See also *Moodale v. Morton*, 1 Brown Ch. 469; . . . *Fourth School District v. Wood*, 13 Mass. 192; 2 Kent's Com. 275; Angell and Ames on Corporations, secs. 23, 24, 33; *Louisville v. University*, 15 B. Mon. 642. These cases, and many more that might be cited, fully indicate the double character which such corporations bear, and the rights which they have, and the relations which they sustain by virtue of each character respectively. They are expressions and illustrations of the reason why, from the fact of towns existing in organized corporations, primarily for certain public political purposes, as auxiliary to the practical government of the state, and as such, are under the absolute control of the legislature, it does not follow that they, as organized corporations, or the inhabitants composing them, can be subjected, arbitrarily, to pecuniary burdens and liabilities, to be responded to either by the property of the town or of its inhabitants. In this case, the practical thing sought to be done under the law in question is, that the town, nominally as a corporation, but in fact the inhabitants of the town subject to taxation, may be compelled to appropriate so much of their property, proportionately, as shall be sufficient to pay for the liquors purchased by Mann in his character of agent, whatever may be the amount. If, through the artificial contrivance of municipal corporations, of which the inhabitants of the state must be members, *volentes volentes*, such consequences can be wrought out, most persons would invoke the exercise of the annihilating power of the government over such corporations, rather than of the power of the police regulation, in virtue of which alone this provision of the law is sought to be sustained.'

"The liquor, the price and liability for which were involved in the foregoing case, was sold to one claiming to be an agent of the town, receiving his authority from a commissioner appointed for the county in which the town was situated, pursuant to an act of the legislature of Vermont, the object of the act being to regulate and restrict the sale of intoxicating liquor, which it was claimed was a police regulation. The language and reasoning in the case are very much in point in the case under consideration: See 1 Dillon on Municipal Corporations, p. 97, sec. 73.

"The constitution very fully recognizes local self-government. Section 6, article 6, makes provision as to where county, township, and town officers shall reside. Section 8, same article, gives to the general assembly power to provide by law for the impeachment of those officers. Section 10, same arti-

cle, provides and gives to the legislature the power of conferring upon county boards powers of a local administrative character. Section 3, article 9, grants to county boards the power to provide county asylums. Section 14, article 7, provides for the election of justices of the peace in the several townships. In clause 4 of the schedule, municipal corporations are continued in force until modified or repealed. No provision is found anywhere in the constitution which takes from the people the right of local self-government.

"The last question which we desire to consider is as to the power of the legislature to create an office and appoint the incumbent. Article 3, section 1, of the constitution, divides the governmental powers into three departments, to wit: the legislative, executive, and judicial; and it is expressly further provided that no person who is charged with official duties under one of these departments shall exercise any of the functions of the other, except as in this constitution expressly provided. It is contended by the appellees that the legislative department is closer to the people than are the other departments, and therefore its powers are more extended than are the powers granted to the other departments. This position cannot be successfully maintained. As all governmental power originally rested with the people, it must necessarily still be lodged with them, except so far as they have delegated it in the constitution. This being true, whatever power has, in the constitution, been delegated to the legislature, it possesses; so with the executive and so with the judicial departments. No general grant of power other than that which is legislative can be found in the constitution. In the exercise of that power, it is supreme, except where the constitution has placed restrictions upon it. All departments of the state government, but each in its respective domain, represent the people, and, except where otherwise provided in the constitution, the incumbents are elected from the people, by the people, and are responsible to the people. Neither department can encroach upon the jurisdiction and functions of the other, unless authority therefor is found in the constitution: *Wright v. Defrees*, 8 Ind. 296; *Waldo v. Wallace*, 12 Id. 569; *Trustees etc. v. Ellis*, 38 Id. 3; *Columbus etc. Ry Co. v. Board etc.*, 65 Id. 427; *Butler v. State*, 97 Id. 373; *Lafayette etc. R. R. Co. v. Geiger*, 34 Id. 186.

"What we here decide is not in conflict with *McComas v. Krug*, 81 Ind. 327, 42 Am. Rep. 135, *Hedderick v. State*, 101 Ind. 564, 53 Am. Rep. 509, and other cases of like import. What these cases decide is, as we have stated above, that the legislature is supreme in the exercise of legislative power, except as limited by the constitution, and so with the other departments: *Lafayette etc. R. R. Co. v. Geiger*, *supra*.

"This leads to the inquiry, What is legislative power? and upon that subject there is an abundance of authority. The word 'legislative' is defined by Worcester as follows: 'That makes or enacts laws; law-making. "Legislative power." Of, or pertaining to, legislation or to a legislature; as "legislative proceedings."' 'Legislative' is defined by Zell as follows: 'Making, giving, or enacting laws. Relating or pertaining to the passing of laws.' Webster defines 'legislative' as follows: 'Giving or enacting laws; as a legislative body. Pertaining to the enacting of laws; suitable to laws; as the legislative style. Done by enacting; as a legislative act.' Wharton, in his lexicon, defines 'legislation' as follows: 'The act of giving or enacting laws.' 'Legislature: the power to make laws.' Abbott, in his law dictionary, under the head of 'legislate,' has the following: 'To make laws. . . . Legislature: the body of persons in the state clothed with authority to make laws.

. . . . Legislative power: that one of the three great departments into which the powers of government are distributed, — legislative, executive, and judicial, — which is concerned with enacting or establishing, and incidentally with repealing, laws.'

"We find the following in *Sinking Fund Cases*, 99 U. S. 700, 761, speaking of the judicial and legislative departments: 'The one determines what the law is, and what the rights of parties are with reference to transactions already had; the other prescribes what the law shall be in future cases arising under it.' Legislative power is the power to enact, amend, or repeal laws: *Lafayette etc. R. R. Co. v. Geiger*, *supra*; *Cooley's Constitutional Limitations*, 90; *Hankins v. Governor*, 1 Ark. 570; 23 Am. Dec. 346; *Wayman v. Southard*, 10 Wheat. 1, 46; *Greenough v. Greenough*, 11 Pa. St. 489; 51 Am. Dec. 567.

"When we come to examine article 4 of the constitution, we find that the powers and restrictions put upon the legislative department are more specifically and definitely prescribed than are those of either of the other departments. Article 4 is composed of many sections, but they all relate to the exercise of legislative power and matters incidentally connected therewith. Section 16 of that article reads: 'Each house shall have all powers necessary for a branch of the legislative department of a free and independent state.'

"We quote the following from a very able opinion by Chief Justice Thompson, in *Page v. Allen*, 58 Pa. St. 336; 98 Am. Dec. 272: 'The expression of one thing in the constitution is necessarily the exclusion of things not expressed. This I regard as especially true of constitutional provisions declaratory in their nature. The remark of Lord Bacon, "that, as exceptions strengthen the force of a general law, so enumeration weakens as to things enumerated," expresses a principle of common law applicable to the constitution, which is always to be understood in its plain, untechnical sense: *Commonwealth v. Clark*, 7 Watts & S. 127.'

"If article 3, section 1, had never been placed in the constitution, the rule of construction as stated by Judge Thompson and Lord Bacon, applied to section 16 of article 4, *supra*, would exclude the legislature from exercising any other than legislative power. But the framers of the constitution were not satisfied, after the experience that the people had had under the old constitution, to rely upon the well-known rules of legal construction, and therefore section 1, article 3, was placed in the constitution, expressly confining each department to its own jurisdiction and functions, except so far as expressly provided otherwise.

"The power to appoint to office is not a legislative function, but belongs to the executive department of the government: *Lafayette etc. R. R. Co. v. Geiger*, *supra*; *Cooley's Constitutional Limitations*, *supra*; *Hankins v. Governor*, *supra*; *Wayman v. Southard*, *supra*; *Greenough v. Greenough*, *supra*; *Broom's Constitutional Law*, 524.

"The conclusion must necessarily follow that the legislature of this state has no power to fill a vacancy occurring in an office, whether of its own creation or otherwise, except express provision therefor can be found in the constitution. The word 'expressly,' being the word that is employed in the constitutional provision, section 1, article 3, Worcester defines as follows: 'In direct terms; plainly.' He defines the word 'express' as follows: 'Given in direct terms; not implied; not dubious; clear; definite; explicit; plain; manifest.' The word 'expressly' is defined by Zell as follows: 'Not by implication; plainly; distinctly.' The word 'express' he defines as follows: 'To set forth in

words; . . . clear, plain, direct; not ambiguous.' Webster's definition of 'expressly' is: 'In an express, direct, or pointed manner; in direct terms; plainly.' His definition of the word 'express' is: 'Directly stated; not implied or left to inference; distinctly and pointedly given; made unambiguous by special intention; clear, plain.' In looking over the constitution it is evident that the framers of the same believed that some such power had been lodged with the legislature. Section 18, article 5, provides that when, during the recess of the legislature, a vacancy shall happen in any office, the appointment to which is vested in the general assembly, etc. Section 30, article 4, provides that no senator or representative shall, during the term for which he may have been elected, be elected to any office, the election to which is vested in the general assembly. Section 13, article 2, provides that all elections by the people shall be by ballot, and by the legislature, *etia voce*. Section 10, article 4, confers on each house the right to choose its own officers, but this is not an election by the general assembly, such as is referred to in articles 2, 4, and 5. Article 5, section 5, gives to the legislature the power of electing a governor or lieutenant-governor when there is a tie, but this is not an election such as is referred to in section 18 of the same article, for no vacancy can occur during a recess of the general assembly; nor is it such an election as is referred to in article 4, because the choice must be made from the two highest candidates voted for by the people. The election of a United States senator is not the election referred to in article 4, for a member of the legislature has never been regarded as ineligible to that office. Whatever power the legislature may have to elect or appoint to office must relate exclusively to state offices. No other construction can be given to section 18 of article 5. It reads: 'When, during a recess of the general assembly, a vacancy shall happen in any office the appointment to which is vested in the general assembly, or when, at any time, a vacancy shall have occurred in any other state office,' etc. After providing for the election of certain county officers, section 3, article 6, goes on to provide that other county and township officers shall be elected or appointed in such manner as may be prescribed by law. Section 9, same article, provides that vacancies in county and township offices shall be filled as may be prescribed by law.

"Taking these different sections together, it is evident that it was not the intention of the framers of the constitution to confer upon the legislature the power to elect or appoint county or township officers, and the legislature has never claimed or exercised this power. The only other section of the constitution relating to the subject under discussion is section 1, article 15. That section reads as follows: 'All officers whose appointments are not otherwise provided for in this constitution shall be chosen in such manner as now is, or hereafter may be, prescribed by law.'

"The constitution went into force on the first day of November, 1851. At that time, there were certain officers who were appointed by the general assembly, all of whom were state officers, as distinguished from local officers, such as county, township, town, and city officers. Counsel for the appellants contend that the adoption of the constitution wiped out all such officers, except as saved by the ninth clause of the schedule. This contention is in the face of the fourth clause of the schedule, which is as follows: 'And all laws now in force, and not inconsistent with this constitution, shall remain in force until they shall expire or be repealed'; and in addition, the constitutional provision which we are now considering expressly continued the mode of appointment until a different mode should be prescribed by law. The words 'now is,' as contained in the said section, continued with the

legislative department the power to appoint such officers as it had the right to appoint on the first day of November, 1851. The words 'or hereafter may be prescribed by law,' which we find in the constitutional provision, confer upon the general assembly the power to prescribe the mode of appointment. Prescribing the mode of appointment is one thing, making the appointment is another. One is the exercise of legislative power, the other the exercise of an executive function.

"As the legislature is limited to the exercise of legislative power, except when otherwise expressly provided, its power ceases when it prescribes the mode of appointment to office, except in cases where express power is given to make appointments. We quote from *Jones v. Perry*, 10 Yerg. 59; 30 Am. Dec. 430, see p. 436: 'The fact that the constitution may prescribe that the mode of appointing the judges shall be by the legislature does not constitute the legislature the constituent.' See *State v. Kennon*, 7 Ohio St. 546 (560). The constitution confers upon the legislature power to organize courts and provide for their jurisdiction, but it cannot exercise judicial power. The officers which the legislature is given the power to appoint are a class of state officers. No other construction can be given to section 18, article 5, of the constitution, which reads: 'When, during a recess of the general assembly, a vacancy shall happen in any office the appointment to which is vested in the general assembly, or when, at any time, a vacancy shall have occurred in any other state office, or in the office of judge of any court, the governor shall fill such vacancy by appointment, which shall expire when a successor shall have been elected and qualified.'

"The antecedent to which the words 'any other state office' relate is an office 'the appointment to which is vested in the general assembly.' Whatever of the offices now in existence which were in existence when the constitution was adopted, to which the legislature appointed the incumbents (section 1, article 15, *supra*), continued the appointing power in the legislature, and so with the other governmental departments, except so far as has otherwise been provided by law. The legislature may provide by law for the appointment of all officers not provided for in the constitution, but the appointing power must be lodged somewhere within the executive department of the government. The only offices now in existence that existed when the constitution was adopted, to which the general assembly exercised the power of appointing the incumbents, are, so far as we have been able to ascertain, the state librarian, warden of the state's prison at Jeffersonville, — State Prison South, — and the trustees of the insane asylum. There may be others; if so, I have overlooked them: R. S. 1843, p. 101; Local Laws, 1845, p. 35; Acts of 1847, p. 99; Acts of 1848, p. 83. The trustees of the blind asylum and of the deaf and dumb asylum were appointed by the governor: Acts of 1845, p. 56; Acts of 1846, p. 19; Acts of 1847, p. 41. Practical construction is of very little consequence when it is exercised in violation of the plain provisions of the constitution.

"We are not of the opinion that the legislature has any power to appoint local officers, — county, township, city, or town. We have not overlooked the case of *Collins v. State*, 8 Ind. 344. The question now under consideration was not raised or discussed in that case. The question considered and decided was as to the right of the governor, under the circumstances, to make the appointment, no vacancy having occurred during a recess of the general assembly. The case of *State v. Harrison*, 113 Id. 434, 3 Am. St. Rep. 663, is not in conflict with our conclusion. We cite the following additional authorities bearing upon the question of legislative power. We quote: 'Under

our form of government the legislature is not suprema. It is only one of the organs of that absolute sovereignty which resides in the whole body of the people. Like other departments of the government, it can only exercise such powers as have been delegated to it; and when it steps beyond that boundary, its acts, like those of the most humble magistrate in the state who transcends his jurisdiction, are utterly void: *Taylor v. Porter*, 4 Hill, 140; 40 Am. Dec. 277; *Pumpelly v. Village of Oswego*, 45 How. Pr. 219, 247; *Campbell's Case*, 2 Bland, 209; 20 Am. Dec. 373."

A little later, in the same state, the right of its general assembly to appoint directors or managers of its benevolent institutions, when questioned, was sustained: *Hovey v. State ex rel. Carson*, 119 Ind. 395; *Hovey v. State ex rel. Riley*, 119 Id. 386. In the case first cited, while all the judges concurred in the general result, no two of them entirely agreed in the reasoning by which it was reached. Judge Mitchell, who had dissented in the cases previously cited from 118 Indiana, wrote a lengthy opinion, in which he expressed his views upon the respective rights of the executive and legislature to appoint to office, as follows:—

"The constitutional power of the general assembly having been challenged by the chief executive of the state, the duty now rests upon the court to consider the questions involved, with that degree of caution and deliberation which their magnitude and the abiding consequences which depend upon their proper solution imperatively demand. Representing one of the co-ordinate departments of the state government, acting under the solemn sanction of official obligation, and realizing that the duty which confronts the court is no less than that of sitting as arbiter to determine a question of power in contention between the general assembly and the chief executive, representing, respectively, and under equally solemn sanctions, the other great departments of the government under which we live, we are admonished that the gravity of the situation is such as demands our most thoughtful and dispassionate consideration.

"At the outset, it is to be remembered that the authority of the legislature in the enactment of laws is subject to no restrictions, save only those imposed by the constitution of the state, the constitution of the United States, and the laws and treaties made in pursuance thereof; that in constructing a statute, it is to be done with a view to uphold it, if that is fairly possible, and that if it be of doubtful constitutionality, the doubts are to be resolved in favor of the enactment: *Beauchamp v. State*, 6 Blackf. 299; *Hedderick v. State*, 101 Ind. 564; 51 Am. Rep. 768.

"The feature of our state constitution which is conspicuous in the organic law of every state of the Union, as well as in the constitution of the United States, and which distributes all governmental powers into three departments, is appealed to as a foundation for the argument against the power of the general assembly to make the appointments in question. Article 3 of the constitution divides the powers of government into three separate departments,—the legislative, the executive, including the administrative, and the judicial; and it declares that 'no person charged with official duties under one of these departments shall exercise any of the functions of another, except as in this constitution expressly provided.' Taking this general distribution of powers among the different departments as a basis, and relying upon those provisions of the constitution which vest the executive, legislative, and judicial powers, respectively, in the governor, the legislature, and the courts, the argument by which the invalidity of the law is sought to be maintained, following general definitions of what constitutes executive, legis-

lative, and judicial power, is to this effect: The power to make appointments to office is essentially and intrinsically an executive function; legislative power is the power to enact, alter, and repeal laws; while judicial power is the power to construe and interpret the constitution and laws, and to render judgments and make decrees determining private controversies. Hence, while it is not explicitly asserted, the conclusion to which the argument, if it be well founded, necessarily leads is, that the appointing power is an executive prerogative, which cannot be interfered with or exercised by the general assembly, or any other department of the government, in the absence of express authority to that end.

"It is universally regarded as one of the chief excellencies of our system that the departments of government are required to be separate, and that the several branches are in most respects practically independent of each other. It has accordingly become an established rule of constitutional law that where general power has been confided to or vested in one department of government, persons intrusted with power in another department will not be permitted to encroach upon the power of, nor exercise functions which pertain and are appropriate to, the other department, unless the authority to do so is conferred in express terms, or unless the exercise of the power becomes necessary and appropriate in order to discharge other constitutional duties and functions expressly committed to it: *Kilbourn v. Thompson*, 103 U. S. 168; *People v. Keeler*, 99 N. Y. 468; 52 Am. Rep. 49. It is a fundamental error, however, to assume that the exclusive right to exercise the power of appointment is included in the general grant of power to the executive. The federal constitution declares, with emphasis, that 'the executive power shall be vested in a President of the United States,' but it was never supposed that this declaration invested the President with the appointing power, which, after long and earnest debate, was conferred upon the chief executive of the nation in express terms: U. S. Const., sec. 1, art. 2.

"That the powers of government are separated into legislative, executive, and judicial, and are confided to different departments, and that powers committed to one department cannot be exercised by persons performing functions in any other, are, as we have seen, well-established features of our system. The boundaries which separate the functions of the different departments are broad, clear, and distinct as applied to matters affecting property rights, or private concern, or the execution or enforcement of existing law; but it is not easy, where the constitution is silent, to discriminate or formulate definitions as to what constitutes legislative, executive, or judicial authority, when questions of public policy, or which relate to the best means and agencies for accomplishing a governmental end or of executing the law, are involved. 'There is,' said Cooley, J., in *People v. Huribut*, 24 Mich. 44 (38), 'no such thing as drawing between legislative and executive power such a clear line of distinction as separates legislative from judicial; and the legislature, in prescribing new rules, have necessarily a large discretion as to whether the agencies for putting them in force shall be named by themselves, or left to the selection of the executive': *State v. Hawkins*, 44 Ohio St. 96; *Fletcher v. Peck*, 6 Cranch, 87 (136); *Wynhamer v. People*, 13 N. Y. 378.

"Upon this subject, the same eminent authority on constitutional law said: 'The authority that makes the laws has large discretion in determining the means through which they shall be executed. . . . Such powers as are specially conferred by the constitution upon the governor, or upon any other specified officer, the legislature cannot require or authorize to be per-

formed by any other officer or authority. . . . But other powers or duties the executive cannot exercise or assume except by legislative authority': Cooley's Constitutional Limitations, 5th ed., 125. The same author, speaking of the exercise of the appointing power as being an executive act, uses this language: 'Where the constitution contains no negative words to limit the legislative authority in this regard, the legislature, in enacting a law, must decide for itself what are the suitable, convenient, or necessary agencies for its execution': Id. 136, note.

"Respecting appointments to office, at least so far as the question now before us is concerned, the constitution, as we shall see, has not left the former to be ascertained by inference or abstract definition. It has been repeatedly affirmed, and it is doubtless true in a sense, that an appointment to office is in its nature intrinsically an executive act, but it by no means follows that the power of appointment may not be confided to other departments than the executive, unless it has been specially conferred upon that department or denied the other: *Taylor v. Commonwealth*, 3 J. J. Marsh. 401; *Achley's Case*, 4 Abb. Fr. 35; *State v. Barbour*, 53 Conn. 76; 55 Am. Rep. 65.

"An examination of the cases, in which expressions in relation to the nature of the act of appointment similar to those above are found, will disclose that no court has ever asserted that the right to make appointments to office was inherently and exclusively an executive prerogative without regard to some express constitutional provision or legal enactment conferring the power; on the contrary, whenever the subject has been considered, with a view to its practical application to cases in hand, it has been held that the executive has no power of appointment to public office, except as it may relate to those who assist in the discharge of his personal executive duties, beyond such as is expressly conferred by the constitution and the laws enacted in obedience thereto, and that the constitution and the laws which confer the power measure the extent of executive authority in that respect: *Mayor v. State*, 15 Md. 376; 74 Am. Dec. 572; *State v. Swift*, 11 Nev. 123; *State v. Irwin*, 5 Id. 111; *Commonwealth v. Hanley*, 9 Pa. St. 513; *Collins v. State*, 8 Ind. 344.

"The constitution and laws furnish the only rule, and are the charter, by which the governor's authority in that respect is to be determined: *Field v. People*, 2 Scam. 79. Accordingly, in *Collins v. State*, *supra*, in which an act of the legislature, creating the office of attorney-general, and providing for the election of that officer by joint ballot of the general assembly, was involved, it appeared that after passing the act the legislature adjourned without filling the office as therein provided. The office being vacant, the governor assumed the right to fill it by appointment. It was held, however, that the executive power of appointment was defined and limited by the constitution and laws, and that, in the absence of any express power to that end, the appointment was void. Other authorities to the same effect might be cited, but the foregoing are deemed sufficient to establish the proposition that the appointing power is not essentially and exclusively inherent in the executive department, and hence that the assertion of such power by a co-ordinate department of the government did not result in an encroachment upon the authority of the executive.

"Our first conclusion, therefore, is, that the general power to choose, elect, or appoint officers is not inherent in the executive, nor in any other branch of the government, but that it is a prerogative of the people, to be exercised by them, or by those departments of government to which it has

been either expressly or by implication confided or reserved in the constitution, and that neither the people, nor those to whom the power has been confided, can exercise the power, except in conformity with the constitution and the laws enacted in pursuance thereof: *People v. Hurbit*, 24 Mich. 44; *Commonwealth v. Baxter*, 35 Pa. St. 263; *People v. Matheson*, 47 Cal. 442; 6 Am. & Eng. Ency. of Law, 294.

"The constitution provides specifically the manner in which certain officers are to be chosen; with reference to those not therein provided for, it directs that they shall be chosen as may be prescribed by law. That was the command of the people concerning a right inherent in them. If the organic law of the state were silent concerning the method of selecting officers whose appointments were not otherwise provided for in the constitution, it would then be necessary in each case to solve the question by construction, and by considering whether the duty or power in each particular case pertained to the legislative, the executive, or the judiciary. But confining ourselves strictly to the case before the court, we assert that the power to appoint agencies for the government of the hospital for the insane is not left to inference, but is expressly conferred upon the general assembly. As we have already seen, the constitution in the most explicit terms enjoins upon the general assembly the duty to make provision by law for the support and maintenance of this institution. The solemn obligation thus imposed was laid directly upon that body, and it was left absolutely untrammelled as to the means and agencies which it should employ in executing the high command of the people. The laws enacted from time to time are therefore to be regarded as having been passed in obedience to the constitutional behest, and as is said in *State v. Marlow*, 15 Ohio St. 114, 'this legislation being not merely permitted, but enjoined, by the constitution, has in effect the same high sanction as though it formed a part of that instrument.' Thus where it was provided by the constitution that the general assembly should provide by law before what authority, and in what manner, the trial of contested elections should be conducted, it was held that an act which provided that cases involving contested elections, where the officers were of a certain class, should be tried by the senate, was within the discretionary power of the legislature, and it was declared that the authority to ascertain facts, and to apply the law to the facts when ascertained, a function in its nature judicial, might be conferred upon other departments of the government than the judicial: *State v. Harmon*, 31 Ohio St. 250; *State v. Hawkins*, *supra*. It follows necessarily, if it is within the discretion of the general assembly, in the enactment of a law commanded by the constitution, or which relates exclusively to matters of political concern, to confer power of a judicial character upon the senate, as in one of the cases cited, and upon the chief executive, as in the other, it may, under like circumstances, provide by law for the exercise of functions of an executive character by the legislature.

"Accepting as correct the proposition that a law enacted in obedience to and in execution of the express command of the constitution, which is not in palpable violation of some express constitutional provision, is of as high sanction as though it were found in that instrument, the further conclusion follows that the command of the constitution which enjoined upon the general assembly the duty to provide by law for the support of the benevolent institutions was equivalent to an express grant of authority to provide for the selection of all such agents or officers as that body should deem necessary to accomplish the duty imposed. Having been thus authorized, the manner of selecting the agencies for the government of these institutions, as provided

by the legislature, is not now open to question by any other department of the government.

"Another consideration of a controlling character leads to the same conclusion as that stated above. The general assembly was charged with the duty already described, and the only constitutional provision outside of what is implied in the section imposing the duty for choosing or appointing agents or officers for the government of the benevolent institutions is the following: 'All officers whose appointments are not otherwise provided for in this constitution shall be chosen in such manner as now is or hereafter may be prescribed by law': Const., sec. 1, art. 15.

"While it is conceded that the above section authorized the general assembly to prescribe by law the manner in which the offices here in question should be filled, the contention is, that it was not competent nor within legislative discretion to vest the right of appointment in the general assembly, but that it was essential to the validity of the law that the appointment of trustees should have been confided to the governor, or to some other executive or administrative officer or board. This position is not maintained by any authority that is at all applicable. The decision in *State v. Kennon*, 7 Ohio St. 546, may be conceded to be a correct exposition of the law, in view of the fact that the constitution, which controlled the judgment of the court in that case, in express terms provided that no appointing power should be exercised by the general assembly, whereby, as was in effect said by the court in that case, the appointing power by that body was 'cut up by the roots.' Similar constitutional provisions control the judgments in *People v. Bledsoe*, 68 N. C. 457, and *People v. McKee*, 68 Id. 429.

"Instead of grants of power to the general assembly, the controlling element in those cases is, that the appointing power was conferred upon the executive, and expressly prohibited to the legislature. It is a reasonable and well-established rule, applicable to the interpretation of a constitutional provision, not only to consider the sense in which those who framed it are supposed to have understood the language employed, but to consider whether a similar provision in the preceding constitution had received judicial or legislative construction at the time of the adoption of the latter. When a constitutional provision has received a settled judicial construction, or a uniform legislative exposition, which has been acquiesced in by the other departments of government and by the people, and is afterwards incorporated into a new or revised constitution, the presumption will be indulged that it was retained and adopted with knowledge of the exposition which it had previously received. In such a case courts will feel constrained to adhere to the construction which the provision had theretofore received, and with which it was presumably readopted: *Moers v. City of Reading*, 21 Pa. St. 188; *Ex parte Roundtree*, 51 Ala. 42; *Cronise v. Cronise*, 54 Pa. St. 255; *People v. Wright*, 6 Col. 92; *Mayor v. State*, 15 Md. 376; 74 Am. Dec. 572; *Davis v. State*, 7 Md. 161; Cooley's Constitutional Limitations, 73. Applying this rule, what follows? Section 8, article 4, of the constitution of 1816 declares, after providing for certain appointments to be made by the governor, that 'all offices which may be created by the general assembly shall be filled in such manner as may be directed by law.' As we have already seen, the state benevolent institutions were organized while the constitution of 1816 was in force. Acting under the authority which it was supposed the above provision supplied, the general assembly uniformly, with the acquiescence of the people and of all the other departments of government, appointed commissioners to control these institutions. The general assembly 'directed

by law' that the commissioners for the government of these institutions should be appointed by the general assembly. This was the practical legislative exposition which the old constitution had uniformly received, and which was presumably known to the framers of the new, and in view of which the corresponding section in the revised constitution was adopted. Note the respect in which the old provision was changed before being incorporated into the new constitution. The appointing power theretofore lodged in the governor was omitted, or eliminated, and the section was made to read: 'All officers whose appointments are not otherwise provided for in this constitution shall be chosen in such manner as now is, or hereafter may be, prescribed by law': Sec. 1, art. 15.

"Trustees of the hospital for the insane are officers for whose appointment no provision was made in the constitution. They are neither county, township, nor municipal officers who were elective or chosen in any other manner at the time the constitution was adopted. On the contrary, as we have seen, they were officers who, according to the method existing at the time the constitution took effect, were appointed by the general assembly. That was the prescribed method then existing, as well as that uniformly since prescribed by law. This must, therefore, be regarded as conferring express authority and unlimited power upon the general assembly to use its discretion in providing for, or prescribing the manner of the appointment of, officers such as those here in question: *People v. Bennett*, 54 Barb. 480; *Ohio v. Covington*, 29 Ohio St. 102; *Walker v. City of Cincinnati*, 21 Id. 14; 8 Am. Rep. 24; *State v. The Judges*, 21 Ohio St. 1.

"The absolute, unlimited power of prescribing the manner of selecting officers of the class here involved was vested by the people in the general assembly. If any doubt remained concerning the power of the general assembly to make the appointments in the manner prescribed by the law in question, it would be the duty of the court, before resolving the doubt against the validity of the solemn enactment of a co-ordinate department of the government, to resort to the interpretation uniformly given to the above provision, contemporaneous with and subsequent to its incorporation into the present constitution. As we have seen, before, contemporaneous with, and uniformly, with the exception of four years since, the general assembly has, without question or challenge, asserted and exercised the right to appoint the officers who should have the government of these state institutions: *State v. Harrison*, 113 Ind. 234; 3 Am. St. Rep. 663. This long-continued, uniform, and unchallenged interpretation of the constitution, sanctioned by the people, and acquiesced in by all departments of government, under well-established rules of construction, must now be regarded as conclusive, and as sufficient to dispel any possible doubt and set the question forever at rest, until the people shall see fit to disturb it by changing the organic law of the state: *Board etc. v. Bunting*, 111 Ind. 143; *State v. Harrison*, 116 Id. 300; *Pollock v. Bridgeport etc. Co.*, 114 U. S. 411.

"Whatever fluctuations may have occurred in legislation concerning other interests, it must be said that through all the varying tides of political opinion, the general assembly, for nearly a half-century, has adhered with singular steadfastness to such a construction of the constitution as gave it the right now questioned. If there were no other ground upon which to rest our decision, this unchallenged legislative exposition would prevent the court from interfering. That the general assembly may, as was done once before, commit the power to the governor, cannot be doubted. Abiding as our conviction might be concerning the propriety of the legislature imposing part of

the responsibility upon, and sharing the supervision and control of these great institutions with, the chief executive of the state, it would neither be fitting, nor would it avail anything, to express that conviction here. The people have imposed the duty upon the legislative department, and to the people it must give account, and not to the courts. The task set this court is performed when we have, in the light of the principles and authorities referred to, stated our conclusions as to the power of the respective departments under the constitution and the law, which constitute the only chart for the guidance of the court, as it does for the other departments of government."

Judges Berkshire and Coffey, while dissenting from most of the views expressed by Judge Mitchell, concurred in declaring the statute in question constitutional, upon the ground that section 1 of article 15 of the constitution declared that "all officers whose appointment are not otherwise provided for in this constitution shall be chosen in such manner as now is or hereafter may be provided for by law." The office in question in this case was that of trustee of the hospital for the insane. At the time of the adoption of the constitution of Indiana containing the foregoing clause, the trustees of the insane asylum were appointed by the legislature, and these two judges regarded this constitutional provision as an authorization to the legislature to exercise the appointing power in those cases where it had been previously exercised by it. Judge Olds stated that he did not concur in all the reasoning of Judge Mitchell, without specifying what portion met his disapproval.

In the next case, 119 Ind. 386, the office in question was that of trustee of an institution for the education of the blind. Chief Justice Elliott wrote the opinion of the court, from which justices Berkshire and Coffey dissented. This office was not one regarding which the legislature had exercised the appointing power previous to the adoption of the present constitution, and therefore the statute in question could not be sustained upon the grounds on which justices Berkshire and Coffey concurred in the judgment in the previous case. In this last decision, the right of the general assembly to appoint the officers of all the benevolent institutions of the state is affirmed. The opinion of Chief Justice Elliott is as follows:—

"The central question which this record presents is this: Is the relator, by virtue of his appointment by the general assembly of the state, entitled to the office of trustee of the institution for the education of the blind? In our judgment he is. That there is a class of officers that may be appointed by the general assembly cannot now be justly denied, and the only question which is still open to debate is, What officers belong to this class? It is our judgment that, in view of the provisions of the constitution and the effect given them by practical exposition, the governing officers of all of the benevolent institutions of the state may rightfully be appointed by the general assembly. The constitution contains provisions which, if they do not do more, do at least supply color for the claim of the right of the general assembly to appoint the governing officers of the benevolent institutions of the state. It is neither necessary nor proper for us to decide as to the general extent of the legislative power to appoint to office, except in so far as it is incidentally involved in the disputed right to the offices of the class claimed by the relator. We are not here confronted with any question as to the right to a local office, or to a general administrative office; for here we have a controversy involving offices of a peculiar nature, the duties of which relate exclusively to institutions that it is made the duty of the legislature to establish and maintain.

"As there is some warrant in the constitution for the claim of the legislative right to appoint the governing officers of the benevolent institutions, it is our duty to ascertain what practical exposition has been given to the constitution, and if we find a principle established by long-continued practice, we must yield to it, unless we are satisfied that it is repugnant to the plain words of the constitution. We are far from asserting that the plain provisions of the constitution may be broken down or overleaped by practical exposition; but what we do assert is, that where, as here, there are provisions not entirely clear and free from doubt, practical exposition is of controlling force.

"Our own and other courts have time and time again adjudged that practical exposition is of controlling influence wherever there is need of interpretation. The language employed by the courts is strong, and the current of opinion is unbroken. In speaking of the effect of a practical exposition, it was said by an able court that 'it has always been regarded by the courts as equivalent to a positive law': *Bruce v. Schuyler*, 4 Gilm. 221; 46 Am. Dec. 447. In adhering to long-continued exposition, another court said: 'We cannot shake a principle which in practice has so long and so extensively prevailed': *Rogers v. Gooden*, 2 Mass. 478. But it is unnecessary to quote the expressions of the courts; for harmony reigns throughout the whole scope of judicial opinion upon this subject: *Board etc. v. Bunting*, 111 Ind. 143; *Weaver v. Templin*, 113 Id. 298, 301; *Stuart v. Laird*, 1 Cranch, 299; *Martin v. Hunter*, 1 Wheat. 304; *Cohens v. Virginia*, 6 Id. 264; *Ogden v. Saunders*, 12 Id. 213, 290; *Minor v. Happersett*, 21 Wall. 162; *State v. Parkinson*, 5 Nev. 15; *Pike v. McGoun*, 44 Mo. 491; *People v. Board etc.*, 100 Ill. 495; *State v. French*, 2 Finn. 181.

"Practical exposition establishes a principle. Particular instances fall within general rules, and practical exposition establishes general rules for the government of particular instances. Practical exposition does not give rights in particular cases, since to give it that effect would create an evil as great as that of class legislation, and against that evil is directed some of the strongest provisions of our constitution. Courts must search for the general principle which practical exposition establishes, and when that principle is discovered, apply it to all cases within its legitimate sweep. The science of jurisprudence is not made up of particular instances, nor can it be so constructed; for if it be a science at all, it must be composed of principles. To us it is clear that what we have here to do is to find what principle has been established, and under that principle bring the particular instance.

"The principle which the long-continued practice has established is, that the general assembly has the power to appoint the governing officers of all of the benevolent institutions, or, at its option, authorize their appointment by some other department of the state government. This is the effect of the practice, and it is narrowing the effect of this practical exposition much beyond what reason and authority justify, to hold that it applies to some of the institutions and not to the others. We cannot believe that the general assembly may rightfully appoint the trustees of the hospital for the insane, and yet have no authority to appoint those of the institution for the education of the blind. That the general assembly has power to appoint trustees of the latter institution, has been expressly decided, and practical exposition has also asserted the same thing. The practice establishes a principle, if it establishes anything; that principle applies to a class of officers, and within that class are the officers of all of the benevolent institutions of the state. It is impossible to conceive why the general assembly may not appoint the officers

of all the benevolent institutions, if it may, as it is settled it may do, appoint the officers of one. The principle is the same in the one instance that it is in the other, and the class embraces all of the officers of the different institutions.

"The decisions of this court either expressly decide or tacitly concede that some appointing power is vested in the general assembly: *Collins v. State*, 8 Ind. 344; *State v. Harrison*, 113 Id. 434; 3 Am. St. Rep. 663; *State v. Denny*, 118 Ind. 382; *Hovey v. State*, 119 Id. 395. The practice which we assume constitutes a practical exposition is therefore one recognized by all the departments of the government, and is of unusual strength. It is so strong that we cannot do otherwise than yield to it, so that, without deciding what effect the provisions of the constitution should have independently of practical exposition, we must decide that, under the operation of this practical exposition, they must be deemed to authorize the appointment of the governing officers of the benevolent institutions, since this practical exposition establishes a general principle which must govern all cases that legitimately fall within its operation.

"The power to appoint, or to direct the appointment of, officers embraced in the class to which the one here in controversy belongs, has been exercised by the general assembly ever since the adoption of our present constitution. At the time that constitution was adopted, this was the practice, and of this practice the framers of that instrument had knowledge. Instead of embodying in the present constitution provisions against the practice, those who framed it placed in it provisions giving the practice substantial recognition, and we cannot, at this late day, assert that the practice persisted in for so many years was in violation of constitutional provisions. They did not, at all events, materially change the former constitution in this particular, although they did essentially change it as to other classes of officers. The claim of legislative power has not been made, it is important to keep in mind, in a few scattered instances, or in a broken and disjointed course, but it has been made and enforced in many instances, and with uninterrupted uniformity.

"We have suggested that the office is a peculiar one, and we may add that it is one which it is evident the constitution did not intend should be filled by the electors of the state at a general election. It is, as it seems to us, an office which may properly be regarded as within the control of the general assembly, the control belonging to that body as an incidental power, the right to establish and maintain benevolent institutions: *Hovey v. State*, *supra*. But we need not decide what would be the effect of the constitutional provisions had there been no long-continued usage; for there was such usage, and it gave the effect to the provisions that we here assign them. The general delegation of power to the general assembly may have been, with much reason, considered as carrying with it, as an incidental power, the right to appoint officers to manage and conduct the state institutions. Such certainly is the force the usage has affixed to those provisions. Offices of the class under immediate mention are not such as every elector may justly claim a right to hold solely on the ground that he is a voter, and all voters are entitled to hold offices; but they are offices which the legislature may restrict to competent persons, by prescribing what shall be the qualifications of those who enter them. It is within the authority of the legislature, by virtue of its general power, to require that the officers of this class shall be selected from different political parties, or that they shall be persons of peculiar skill and experience. It may, indeed, provide for the appointment

of women to this class of offices, as has been done in some instances. If we are wrong in affirming that, in this class of offices, the legislature may prescribe particular qualifications, then the practice of all the departments has been, in many instances, a persistent violation of the constitution.

"Another consideration, not without importance, and one that is to be regarded in construing the constitution and giving effect to its provisions, is, that the benevolent institutions are the property of the state, and as such within the general control of the legislature. As the legislature has general authority over the property of the state, and as it may appoint agents or officers to manage that property, there is a solid foundation for the practice which has so expounded the constitution, or aided in expounding it, as to give the general assembly the power to appoint the governing officers of the benevolent and other state institutions. The basis of the practice is the familiar principle that the grant of a principal power carries with it all necessary subsidiary powers."

LAVENSON v. STANDARD SOAP COMPANY.

[80 CALIFORNIA, 245.]

MORTGAGE, IF FIXTURES SUBJECT TO A MORTGAGE ARE REMOVED UNLAWFULLY, may, after he has foreclosed his mortgage and ascertained what deficiency remains due him, maintain an action against persons guilty of such removal for the damages occasioned thereby.

FIXTURES, TESTS OF. — TO DETERMINE WHETHER A THING IS A FIXTURE OR NOT, we must look at the manner in which it is annexed, the intention of the person who made the annexation, and the purpose for which the premises are used.

FIXTURES, WHAT ARE. — Gun-metal, digester, soap-kettles, boilers, and candle-machines, which are appliances of a permanent character, put into and attached to a building with the intention of making soap and candles, are fixtures, and form a part of the realty.

MORTGAGE — FIXTURES. — A CLAUSE IN THE MORTGAGE that "all boilers, engines, and fixed machinery shall be deemed to be included in said property," cannot be considered as excluding from the mortgage fixtures not specifically mentioned, and which would have been embraced in such mortgage had such clause been omitted.

Daniel Titus, and Mastick, Belcher, and Mastick, for the appellants.

T. C. Coogan, and Freeman, Johnson, and Bates, for the respondent.

GIBSON, C. Action on the case for damages suffered by the impairment of a mortgage security. Judgment for plaintiff, from which, and an order denying a new trial, defendants appeal.

The complaint shows that the plaintiff had from the Mege Pacific Commercial Company, one of the defendants, a prop-

erly executed and recorded mortgage upon the realty therein described; that the other defendant, knowing this fact, with the said mortgagor, dug up, detached, and removed certain fixtures, permanently attached to the realty, well knowing that such severance and removal would impair and render insufficient plaintiff's security, and by such acts it was rendered insufficient; that said mortgagor was at the time insolvent, and has since so remained; that thereafter plaintiff foreclosed his mortgage and failed to realize sufficient to satisfy his claim; that a personal judgment for the deficiency was entered and remains unsatisfied. These facts are amply sufficient to constitute a cause of action, and the demurrers were properly overruled.

Section 2929 of the Civil Code provides that "no person whose interest is subject to the lien of a mortgage may do any act which will substantially impair the mortgagee's security." The converse of this rule was declared in *Hill v. Gwin*, 51 Cal. 47, in which it was held that a mortgagor was answerable in damages for the removal, prior to foreclosure, of fixtures attached to the mortgaged property.

"In New York, the mortgagee may have an action on the case against the mortgagor for injury to the mortgage security": 2 Washburn on Real Property, 14, and the leading case of *Van Pelt v. McGraw*, 4 N. Y. 110, there cited. That case was approved by this court, in support of the same principle, in the case of *Robinson v. Russell*, 24 Cal. 467.

That was a suit by a mortgagee in possession for an injunction to restrain the defendants from removing from the premises mortgaged certain trees and vines, and a steam-engine and pump erected to irrigate the land, and to prevent one of the defendants from paying over to his co-defendants certain money in his hands representing fruit sold from the premises. It was found by the trial court that the defendants had not removed, and did not intend removing, from the premises anything beside the growing fruit, nursery trees and vines, which had been attached by the sheriff at the suit of some of the defendants. Defendants had judgment, which was affirmed, for the reasons that the injuries resulting from such acts were not irreparable, and it did not appear but what adequate damages for the trespass could be recovered against the defendants, as it was not shown that they were insolvent. The court said: "There can be no doubt but what an action can be maintained by the mortgagee for injuries of the char-

acter set forth in the complaint in this case, when it appears that by the acts complained of the mortgaged security is impaired. This is clearly shown in *Yates v. Joyce*, 11 Johns. 136, *Lane v. Hitchcock*, 14 Id. 213, and *Gardner v. Heartt*, 3 Denio, 232, cited by appellants' counsel, and more fully in *Van Pelt v. McGraw*, 4 N. Y. 110. But all those were actions on the case for the wrongful and fraudulent injury committed upon the premises, whereby the mortgagee's security was impaired. There can be as little doubt that the mortgagee may, by injunction, stay the commission of waste upon the mortgaged premises, when he makes a proper case in equity, and shows that the threatened acts will materially impair the value of the property subject to the lien, so as to render it inadequate security for the mortgage debt."

Thus it appears that the mortgagee has concurrent remedies by an action at law for damages, or by suit in equity for an injunction to prevent threatened damages. This seems reasonable under a system like ours, where nothing but a lien passes to the mortgagee, which would not enable him to maintain replevin for fixtures severed from the freehold, as could be done at common law, where the legal title passed to the mortgagee.

The removal of the fixtures complained of in this case deprived the mortgagee of his lien thereon: *Buckout v. Swift*, 27 Cal. 433; 87 Am. Dec. 90; and before he could resort to other property of the mortgagor, it was incumbent upon him to exhaust his mortgage security: Code Civ. Proc., sec. 726; *Ould v. Stoddard*, 54 Cal. 613; *Bartlett v. Cottle*, 63 Id. 366; *Mascarel v. Raffour*, 51 Id. 242. This he did do, and found it insufficient, by reason of the wrongful removal of some of the fixtures, and his personal judgment against the mortgagor of little worth, on account of its insolvency.

The findings substantially show that on and prior to the twentieth day of November, 1882, the plaintiff was the owner of certain real property in South San Francisco, with the building thereon and certain machinery and fixtures therein, viz.: One gun-metal digester, two soap-kettles, one high-pressure boiler, and thirteen candle-machines, each and all of which were permanently affixed to the realty, and formed a part thereof.

There were on that date certain other fixtures in the building that had been detached and severed therefrom, and which were not included in or subject to the mortgage executed on

the same date, and hereinafter mentioned. All of these appliances were adapted to the manufacture of soap and candles, and were by the plaintiff put in and together with the premises were used by him for such purpose. On the twenty-second day of August, 1882, he leased the premises to one Easterbrook for ninety days from said date, with the knowledge that the lessee intended to manufacture oleomargarine and stearine on the premises, if the lessee should determine that such business could be conducted at a profit, in which event he, the lessee, intended to form a corporation to carry on such business on the premises, and place thereon machinery suitable for the purpose. Thereafter, the defendant corporation, the Mege Pacific Commercial Company, was formed, and on the 20th of November, 1882, purchased the premises and fixtures of the plaintiff for the sum of twenty-five thousand dollars, of which sum it paid ten thousand dollars, and gave its promissory note for the remainder, and on the same date, to secure the payment of the note, executed and delivered to plaintiff a mortgage on the same premises. This mortgage was on the twenty-third day of the same month duly recorded. After the execution of the mortgage, Easterbrook and the mortgagor, at an expense of about \$9,386.86, placed on the property certain machinery and appliances, only adapted for manufacturing oleomargarine and stearine, which on the suspension of the business became and remained useless, and did not add anything to the salable value of the mortgaged premises. None of these appliances so put in by the mortgagor were intended to be or were received by the plaintiff as security for the promissory note in place of the fixtures which were covered by the mortgage.

Prior to the thirteenth day of April, 1884, the mortgagor became insolvent, and finding its business unprofitable, suspended the same permanently, and about said date sold to its co-defendant, the Standard Soap Company, the gun-metal digester, two soap-kettles, one high-pressure boiler and mountings, and thirteen candle-machines, together with other fixtures not attached to nor a part of the realty, nor subject to the mortgage lien. The Standard Soap Company thereupon dug up, detached, and removed from the premises, without the consent of plaintiff, the said digester, soap-kettles, boiler, and candle-machines.

These articles at the time of their removal were of the aggregate value of \$4,950, to which extent plaintiff's mortgage

security was permanently decreased by such removal. Both defendants knew at the time of the removal that the articles were subject to the mortgage lien, and that the removal of them would impair and render insufficient the mortgage security of plaintiff, which prior and up to the time of the removal was of the value of twenty-five thousand dollars.

Plaintiff, after the removal of the articles, foreclosed his mortgage, and caused the property to be sold on execution, and the proceeds realized therefrom failed to the extent of \$9,947.50 to satisfy his claim. For this deficiency a personal judgment was entered against the Mege Pacific Commercial Company, which still remains insolvent.

The principal question raised by the appellant is, whether the articles, for the value of which the court below gave judgment, were affixed to the realty and were covered by the mortgage lien.

Real property, as defined by the Civil Code, section 658, is land and that which is affixed thereto; and "a thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines, or shrubs; or imbedded in it, as in the case of walls; or permanently resting upon it, as in the case of buildings; or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts, or screws": Civ. Code, sec. 660.

In order to determine whether a thing is a fixture or not, we must look at the manner in which it is annexed, the intention of the person who made the annexation, and the purpose for which the premises are used: *Fratt v. Whittier*, 58 Cal. 126; 41 Am. Rep. 251; Jones on Mortgages, secs. 429, 444.

The fixtures here consisted of a digester made of gun-metal, two soap-kettles, one high-pressure boiler, and thirteen candle-machines. The digester was twenty feet long and forty inches in diameter. It was four or five feet under the ground below the basement floor, and extended up through this floor and about three feet above the next floor. There was a brick wall four inches thick surrounding it, and extending up to the second floor. The digester contained a pump, and was connected by steam-pipes with the high-pressure boiler. The soap-kettles were large, each having a capacity of fifty thousand pounds. They were attached to heavy brick walls, extending about five feet above the basement floor by sheet-iron bolted thereto, and were also connected by steam-pipes with the boiler. The high-pressure boiler was sixteen feet long and

three feet in diameter, and was connected with two other boilers by a brick wall and steam-pipes and a heavy cast-iron front-piece. It rested on a brick foundation, and was all inclosed, except the front, with brick walls, which formed a nest. The sides of this nest were bolted together with iron bolts three fourths of an inch in diameter, extending through from one side to the other, and were fastened with nuts. On one side they ran through the timbers that supported the building, and on the other side through iron braces. The candle-machines were on the third floor of the building, and were nailed to scantlings, which were in turn fastened to the floor. They contained perforated steam-pipes, and were attached to the boilers by steam-pipes. All these appliances were of a permanent character, and were put into and attached to the building by the plaintiff with the intention of using them for the making of soap and candles, for which purpose the premises were used and solely appropriated by him prior to his lease thereof to Easterbrook, and the subsequent transfer of the property, in November of the same year, to the Mege Pacific Commercial Company.

Thus it is clear, considering the character of the appliances, the manner in and the intention with which they were affixed to the land and building, and their necessity for the uses to which the premises were devoted, that they were fixtures, and formed part of the realty within the meaning of the provisions of the Civil Code. And as the court has found, upon evidence that is not without conflict, that they were all in position and undetached at the time the mortgage was executed, we cannot disturb the finding.

The mortgage contains this clause: "All boilers, engines, and fixed machinery shall be deemed to be included in said property." As the fixtures in dispute were part of the realty, they passed with the grant of the property to the Mege Pacific Commercial Company, and became subject to the lien of the mortgage that was given back to plaintiff, which created "a lien upon everything that would pass by a grant of the property": Civ. Code, sec. 2926. Therefore the words quoted, in the absence of evidence *aliunde*, cannot be construed to restrict the operation of the mortgage to the land and building alone: *Allen v. Woodward*, 125 Mass. 250; 28 Am. Rep. 250.

There was a bill of sale of "all the machinery, boilers, pipes, shafting, belting, candle-molds, presses, wheels, pulleys, barrels, tubs, tallow, and any and all other personal property"

on the premises given to the Mege Pacific Commercial Company with the deed of the premises. This, together with certain parol evidence, was adduced by defendants to show that, at the time the sale of the premises and fixtures was consummated, all the parties thereto understood all the appliances on the premises, whether detached or not, to be personal property, and that the bill of sale was given as evidence of the sale thereof, and the mortgage, being a mortgage of real property, was not intended to and did not include them. But the trial court, in finding that the articles for which damages were awarded were part and parcel of the realty, and were covered by the mortgage, which finding, as before remarked, cannot be disturbed, must have concluded that the bill of sale, if it had any operation at all, transferred only the fixtures that at the time were severed from the premises, and that the deed carried the undetached fixtures as part of the realty.

Looking at the entire record, we perceive no error, and therefore advise that the judgment and order be affirmed.

FOOTE, C., and VANCLIEF, C., concurred.

The COURT. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

Hearing in Bank denied.

FIXTURES — WHAT ARE: See *Dudley v. Hurst*, 67 Md. 44; 1 Am. St. Rep. 288; note to *Pierce v. George*, 11 Am. Rep. 314-317; note to *Hunt v. Mulamphy*, 14 Am. Dec. 303, 304; note to *Gray v. Holdship*, 17 Id. 686-696. The nature of the articles, the manner in which they are affixed, and the intention of the party making the annexation, together with the policy of the law, are controlling factors in determining whether an article which may or may not be a fixture becomes part of the realty by being annexed to the freehold: *Binkley v. Forkner*, 117 Ind. 176. To give a chattel the character of a fixture, three things are requisite: actual annexation, application to the purpose to which that part of the realty with which it is connected is appropriated, intention of the parties to make a permanent accession to the freehold: *Henkle v. Dillon*, 15 Or. 610. But the owner of land can by agreement reimpress the character of personality upon chattels which by annexation to the land have become fixtures: *Tyson v. Post*, 108 N. Y. 217; *Freeman v. Leonard*, 99 N. C. 274; *Henkle v. Dillon*, 15 Or. 610; compare *Pond Machine T. Co. v. Robinson*, 38 Minn. 272; *Burrill v. Wilcox Lumber Co.*, 65 Mich. 571; *Second Nat. Bank v. O. E. Merrill Co.*, 69 Wis. 501; *Harkey v. Cain*, 69 Tex. 146.

THE PRINCIPAL CASE is one of the few in which mortgagees have sought and obtained compensation for injuries suffered by them from the wrongful removal of fixtures constituting parts of the mortgaged property. Where a mortgage vests the mortgagee with the legal title, or with the right to the immediate possession of the property mortgaged, he may doubtless maintain

replevin to recover possession of such property when wrongfully detached and taken, or for its value in case possession thereof cannot be had. In many of the states, a mortgage of realty no longer conveys the legal title. The mortgagee has a mere lien, which he may foreclose for the collection of his debt; and he cannot be injured by any wrong done to the mortgaged premises which does not so impair their value as to make them no longer an adequate security for his debt.

In some of the cases the assumption is made that no action can be sustained by a mortgagee until he has foreclosed his mortgage, sold the property, and ascertained the extent of the deficiency which will remain due him after the proper application of the proceeds of the sale. There must, however, be cases to which this assumption cannot apply, as where, though no sale has taken place, it indubitably appears that the security has been so substantially impaired that the mortgagee must lose part of his debt, and the debt itself is not due, so that no action for foreclosure can be maintained.

In the principal case, the mortgage had been foreclosed and the deficiency ascertained, and the mortgagor was insolvent. Under such circumstances, there can be no doubt of the mortgagee's right to maintain an action, and to recover therein the value of fixtures removed, not to exceed the sum remaining due him and secured by the mortgage.

The leading case upon this subject is *Van Pelt v. McGraw*, 4 N. Y. 110. In that case Van Pelt sued McGraw and one Southwarth for removing rails, timber, etc., from certain lands on which he held a mortgage, thereby injuring his mortgage security. The mortgagors were insolvent, and the premises, after the removal of the timber, etc., were an inadequate security for the amount due on the mortgage, including the costs of foreclosure suit. The premises were sold under a decree, and a deficiency judgment resulted. The fixtures were removed before the sale, and the premises were thereby lessened in value. The acts were done by McGraw, and Southwarth aiding and assisting him, with knowledge of plaintiff's mortgage. Defendant's counsel requested the court to charge the jury that McGraw, having the fee of the land, and being in possession, had a right to take off fences and timber. The court charged that the acts were lawful if they did not prejudice the plaintiff's rights or impair his mortgage security; but if the defendant had impaired that security, with a knowledge of the lien, then their acts were wrongful and fraudulent. Verdict and judgment for plaintiff. The judgment was affirmed by the court of appeals, and in relation to this cause of action, Judge Pratt, who delivered the unanimous opinion of the court, said: "There is no doubt but that an action on the case will lie for an injury of the character complained of in this case. It forms no objection to this action that the circumstances of the case are novel, and that no case similar in all respects has previously arisen. The action is based upon very general principles, and is designed to afford relief in all cases where one man is injured by the wrongful acts of another, where no other remedy is provided. This injury may result from some breach of positive law, or some violation of a right or duty growing out of the relation existing between the parties: 1 Cow. Treat. 3. The defendant, McGraw, in this case, came into the possession of the land subject to the mortgage. The rights of the holder of the mortgage were, therefore, paramount to his rights, and any attempt on his part to impair the mortgage as a security was a violation of the plaintiff's rights. But the case is not new in its circumstances. The case of *Gates v. Joyce*, 11 John. 136, was precisely like the case at bar in principle. That

action was brought by an assignee of a judgment against a person for taking down and removing a building from the land upon which the judgment was a lien. The plaintiff's security was thereby impaired. The court, in that case, sustained the action. The decision in that case was referred to and approved in *Lane v. Hitchcock*, 14 Id. 213, and in *Gardner v. Heart*, 3 Denio, 234. Nor is there anything in the case of *Peterson v. Clarke*, 15 Johns. 205, which conflicts with the principle of these cases. That was an action by a mortgagee in the usual form of an action for waste. The declaration alleged seisin in the plaintiff, upon which the defendant took issue. There was no allegation that the mortgagor was insolvent, or the judgment as a security impaired. The only issue to be passed upon was that in relation to the seisin. It is quite clear that upon such an issue the mortgages must fail. Now, this action is not based upon the assumption that the plaintiff's land has been injured, but that his mortgage, as a security, has been impaired. His damages, therefore, would be limited to the amount of injury to the mortgage, however great the injury to the land might be. It could, therefore, be of no consequence whether the injury occurred before or after forfeiture of the mortgage. The action is clearly maintainable."

And in relation to the charge to the jury, above quoted, the court said: "As an answer to the proposition of the defendant's counsel, the charge was correct. Acts may be harmless in themselves, so long as they injure no one, but the consequences of acts often give character to the acts themselves. It is upon this distinction that the maxim is based, *Sic utere tuo ut alienum non laedas*. As I have before observed, the lien of the plaintiff upon the land was paramount to any interest which the defendants possessed therein, and any willful injury of that lien by them was a violation of the plaintiff's rights, for which an action would lie."

The same rule prevails in Ohio. There an action was brought by a mortgagee to recover damages for the removal of a steam-engine and other fixtures from the mortgaged premises, which removal operated to impair plaintiff's mortgage security. It was held that the action would lie. We quote from the opinion of Chief Justice Wood, in *Allison v. McCune*, 15 Ohio, 726; 45 Am. Dec. 606: "To simplify the facts, the agreed case shows he was a mortgagee of Andrew Allison; the condition of the mortgage was broken, and the defendant was a subsequent judgment creditor of Andrew. As against Andrew, the lien of the plaintiff's mortgage was older than that of the defendant's judgment. Under these circumstances, the defendant, with his execution issued upon his judgment, interferes and lessens the plaintiff's security by removing the fixtures and destroying the mill covered by the plaintiff's mortgage, so that the mortgage lien is an insufficient security for the plaintiff's debt, and Andrew Allison had no other property of any description. In our opinion, on principle, where such security is thus diminished, and damages result from the act to the plaintiff, the action lies. For authority we have examined only the cases cited. *Smith v. Goodwin*, 2 Greenl. 173, presents a case directly analogous. M. mortgaged to W., and afterward erected a house on the land. M. sold the premises to another, and he sold the house to the defendant, who removed it. The mortgage was assigned to the plaintiff, and it was held he might recover the value of the house. *Stowell v. Pike*, 2 Id. 387, is a similar case, but the action was trespass."

This case was approved in *Carpenter v. Canal Co.*, 35 Ohio St. 307, in the following language: "Doubtless a mortgagee could maintain an action at law for injury to his rights. Thus in *Allison v. McCune*, 15 Ohio, 726, this

court held that a special action on the case lies against one who lessens a mortgage security, and damages may be recovered to the extent of any actual injury sustained by such act, although the mortgagee was not in possession. There the injury was the destruction of a mill on the premises mortgaged."

The doctrine of *Van Pelt v. McGraw*, *supra*, is approved by Judge Washburn in his work on real property (vol. 2, sec. 27): "In New York, the mortgagee may have an action on the case against the mortgagor for injury to the mortgage security." And also by Jones on Mortgages, paragraph 569: "It is only when the purchaser cuts the wood, with knowledge of the lien, and with intent to injure the holder of it, that he is liable to him for an injury done the security."

The supreme court of California has fully sustained the same principle in the case of *Robinson v. Russell*, 24 Cal. 467. The opinion of the court was by Judge Rhodes, and from it we quote: "There can be no doubt but that an action can be maintained by the mortgagee for injuries of the character set forth in the complaint in this case, when it appears that by the acts complained of the mortgage security is impaired. This is clearly shown in *Yates v. Joyce*, 11 Johns. 136, *Lane v. Hückcock*, 14 Id. 213, and *Gardner v. Heartt*, 3 Denio, 232, cited by the appellant's counsel, and more fully in *Van Pelt v. McGraw*, 4 N. Y. 110. But all those were actions on the case for the wrongful and fraudulent injury committed upon the premises, whereby the mortgagee's security was impaired. There can be as little doubt that the mortgagee may, by injunction, stay the commission of waste upon the mortgaged premises, when he makes a proper case in equity, and shows that the threatened acts will materially impair the value of the property subject to the lien, so as to render it an inadequate security for the mortgage debt."

[IN BANK.]

BANNING v. BANNING.

[80 CALIFORNIA, 271.]

TELEPHONE, ACKNOWLEDGMENT OF DEED BY.—The fact that a married woman is not personally present before a notary at the time he takes her acknowledgment through a telephone, she being three or four miles distant from him, will not vitiate such deed; because, in the absence of fraud, accident, or mistake, the certificate of the notary, in due form, is conclusive of the material facts therein stated.

Houghton, Silent, and Campbell, and J. S. Chapman, for the appellant.

Smith and Patton, and F. H. Howard, for the respondents.

VANCLIEF, C. Action for partition of land. The complaint is in the most general form, alleging that the parties own the land as tenants in common, and specifying the undivided portion to which each party is entitled. The answer denies that either of the plaintiffs has any estate in the land, and

alleges that the defendant is the sole and exclusive owner, and in the exclusive possession thereof.

In addition to her answer, the defendant filed what she denominated a cross-complaint, which, in substance, was only a repetition of her answer.

The plaintiffs unnecessarily answered this so-called cross-complaint by repeating the substance of their complaint, and further alleging, among other things, that they derived title to the undivided portion of the land claimed by each of them directly from the defendant.

Upon these pleadings a trial was had, and on August 2, 1888, the court made and signed written findings upon all the issues in favor of the plaintiffs, and especially found that "the aforesaid interests of the plaintiffs are all and each of them deraigned from the defendant by conveyances from the defendant to the plaintiffs respectively, by her duly signed, acknowledged, and delivered to the plaintiffs respectively."

After the aforesaid findings were written and signed, the court, at the request of the defendant, made and signed additional findings on a separate paper, which was filed August 3, 1888, and the original findings of August 2d were also filed on August 3d, on which day the interlocutory decree in favor of plaintiffs, from which this appeal is taken, was filed.

The appeal rests upon the judgment roll alone, including the additional findings, and appellant's counsel contend that the findings do not support the judgment, for the reason that they do not show that defendant executed the deeds to the plaintiffs by which plaintiffs claim title. The special and only ground of objection to the sufficiency of the execution of those deeds is, that at the time the deeds were acknowledged the defendant was a married woman, and was not visibly, and therefore not personally, present before the notary at the time he took her acknowledgment through a telephone, she then being three miles distant from him, as appears by the additional findings.

The answer to this objection is, that in the absence of fraud, duress, accident, and mistake, the certificate of the notary in due form of law is conclusive of the material facts therein stated. The facts stated in the additional findings were not admissible as evidence to dispute the official certificate of the notary; and if admitted should have been disregarded, as they evidently were, by the trial court.

It is admitted that the certificate of the notary is in due

form; and it is not alleged or pretended by the defendant that she did not voluntarily sign and deliver the deeds; nor that she did not voluntarily, and without the hearing of her husband, acknowledge the execution of them through the telephone, after having been informed by the notary of their contents; nor that any deception or fraud was practiced to induce her to execute the deeds; nor even that the plaintiffs had notice of the manner in which it is alleged that she acknowledged the execution through the telephone.

These particulars are not stated for the purpose of maintaining that, under any circumstances, an acknowledgment of a deed may be taken through a telephone, but for the sole purpose of showing that there is no pretense of fraud, duress, or mistake.

In *De Armas v. Escandon*, 59 Cal. 489, the court below had found that the defendant—a married woman—had acknowledged a deed through an interpreter, who did not correctly interpret the contents of the deed, but misrepresented the deed as being a mortgage to secure the payment of three thousand dollars, when, in fact, it was an absolute deed. This court said: "But it is not alleged, found, or claimed that the plaintiff had any notice of these facts. It is clear, therefore, that the notary's certificate is conclusive as to the facts stated in it": Citing *Jones on Mortgages*, sec. 538; *Grant v. White*, 57 Cal. 141; *Baldwin v. Snowden*, 11 Ohio St. 208; 78 Am. Dec. 303.

In *Grant v. White*, *supra*, this court said: "We do not see that fraud or imposition was practiced upon her at the time of the execution of the mortgage. . . . We think the rule regarding the execution of instruments by married women is correctly stated by Mr. Jones in his work on mortgages, section 538."

In the section referred to, Mr. Jones says: "As to statements of fact contained in a certificate of acknowledgment which is regular in form, such, for instance, as the fact that the grantor appeared and acknowledged the execution of the instrument, they can only be impeached for fraud; evidence which is merely in contradiction of the facts certified to will not be received."

To the same effect is the decided weight of authority in other states.

I think the judgment should be affirmed.

BELCHER, C. C., and HAYNE, C., concurred.

The COURT. For the reasons given in the foregoing opinion, the judgment is affirmed.

Rehearing denied.

ACKNOWLEDGMENTS. — The act of an officer in taking acknowledgments is judicial in its character, and therefore cannot be impeached collaterally: *Murrell v. Diggs*, 84 Va. 900; 10 Am. St. Rep. 893, and note 895.

THE LAW OF THE TELEPHONE is discussed in the note to *Central U. T. Co. v. Falley*, 10 Am. St. Rep. 128-136.

[IN BANK.]

PEOPLE v. McDONNELL.

[80 CALIFORNIA, 285.]

COUNTERFEITING — NOTES OF THE BANK OF ENGLAND. — Having knowingly, willfully, unlawfully, and feloniously in one's possession a certain stamp, block, or plate designed and engraved for the purpose of striking and printing counterfeit bank notes in likeness of and similitude to the genuine notes of the Bank of England, is a crime, punishable under section 408 of the Penal Code of California.

INDICTMENT FOR HAVING IN POSSESSION A CERTAIN STAMP, BLOCK, OR PLATE FOR COUNTERFEITING NOTES OF THE BANK OF ENGLAND need not allege the incorporation of that bank. As a matter of identity the description is satisfied by proof that the company is known as a corporate company and is acting as such, and as such issues bills which come within the statute.

CONFLICT OF LAWS — PUNISHMENT BY STATE OF ACTS WHICH ARE ALSO CRIMES AGAINST THE UNITED STATES. — That which is made criminal by the laws of the United States may also be declared a crime against this state and its citizens, and may be punished as an infraction of the laws of this state. Hence, one guilty of having in his possession a block or plate from which may be printed a note of a foreign bank, may be indicted and punished in this state, though his offense is also punishable under the laws of the United States. He has in truth been guilty of two crimes, one against the state and another against the United States, and each may prosecute and punish the crime against it.

GUILTY POSSESSION OF PLATE OR BLOCK TO BE USED IN COUNTERFEITING. — One who procures from an engraver a block or plate, with intent to employ the same in printing counterfeit bank notes therefrom, has such guilty possession thereof as will sustain his conviction, although the delivery of the same to him by such engraver was in pursuance of an understanding between the latter and certain policemen that such delivery was to be made, and that they were immediately to arrest the defendant with such block or plate in his possession and to take it away from him; and pursuant to such understanding, they at once made such arrest and took from defendant the possession of such block or plate.

APPEAL from orders denying a motion in the arrest of judgment and a motion for a new trial. The facts are sufficiently stated in the opinion. The instructions given and refused by the court, so far as relied on by the defendant, were in substance as follows: At the request of the prosecution the jury were instructed thus: "Possession is the state of having a corporal thing in one's power or under one's control; that condition of fact under which one can exercise his power over a corporal thing at pleasure. Now, the word 'possession' means, in law, having the control or custody of a thing; detention of anything as one's own, and for his enjoyment, is a general definition of the word 'possession.' And under what I believe to be the law of the land, I charge you, in plain English, that if, from the evidence in this case, you believe, beyond all reasonable doubt, that the defendant, on or about the twenty-second day of October last, went to the place of business of the witness, Hull, and then and there entered into arrangements with him by which he, Hull, was to make this plate which has been offered in evidence to you; and if, in pursuance of such arrangements, Hull did proceed to make that plate under the instruction and at the request of the defendant; and if at that time defendant purposed to use that plate, when finished, for the purpose of issuing counterfeit bills or notes of the Bank of England; and if Mr. Hull proceeded to complete this plate or instrument, as he testified that he did, and that he had interviews with defendant relative to the same; and if, afterwards, on the fifth day of December, in pursuance of such intent or purpose, the defendant went there, having paid for the block, and received this block from Mr. Hull, took it into his custody, into his possession, took it into his hands, and left the place of Mr. Hull with it,—then I charge you that such act and such circumstances would be such a possession of this instrument as the law denounces, providing, of course, that you are satisfied, from the evidence, that the defendant in receiving and taking it had a guilty intent to use it in the unlawful and felonious manner which I have designated and spoken of." The defendant asked for the following instruction, which was refused by the court: "If an engraver and some policemen had entered into a mutual agreement with each other that the plate in question, when completed by the engraver, should not be delivered into the possession of the defendant, to be retained by him according to his pleasure, but on the contrary, that is, to be handed to defendant only at the moment when said

policemen were present, ready, and on purpose, and with the intent, to take it from the hands of the defendant as soon as it had been handed to him by the said engraver, and if, in pursuance of said agreement, said plate was so put into the hands of defendant, and said policemen did at once take it from him, and retain it thenceforward, then I declare that such having or holding as defendant so had was not possession of said plate, and was not the possession which is meant by section 480 of the Penal Code." The defendant asked for various other instructions, but as they were only presentations in different forms of the same principles of law embodied in the refused instruction hereinbefore set forth, we need not repeat them.

C. B. Darwin, Crittenden Thornton, and F. H. Mersbach, for the appellant.

Johnson, attorney-general, and Davis Louderback, for the respondent.

FOOTE, C. The defendant was charged by information, under section 480 of the Penal Code, with having knowingly, willfully, unlawfully, and feloniously in his possession a certain stamp, block, and plate made use of in counterfeiting bank notes, designed and engraved for the purpose of striking and printing counterfeit bank notes, in the likeness of and similitude of the genuine five-pound notes of the Bank of England; such possession being had by him for the purpose of knowingly and feloniously counterfeiting such bank notes.

His demurrer to the information on various grounds was overruled. He then pleaded not guilty, was tried, and convicted as charged. A motion for a new trial was made and refused, as also a motion in arrest of judgment. From the two orders made upon the motions mentioned, and the judgment of conviction, the defendant has appealed.

The jurisdiction of the trial court is assailed, on the ground that the information did not present any offense against the laws of this state, in that the note set out, and which the plate was said to be intended to print, was not sufficiently averred to be a bank note; that if it was a bank note, it was a foreign one, and not within the bank note protected by the Penal Code of this state, in section 480 thereof.

That if the note set out in the information, to quote the language of his brief, "did fall within the bank notes named in our state code, yet the state had no jurisdiction herein, because

the Congress of the nation, by virtue of its international power, and in discharge of its international duty, had enacted a law for the protection of the very same bank note, and denounced the very same plate in the same terms and with the same intent, and had therein submitted the jurisdiction to its own tribunals, and had made no reservation in favor of state courts, that therefore, under the laws regulating judicial cognizance, the state court had no jurisdiction of the offense, even though she had denounced the same transaction in her code."

Section 480 of the Penal Code, under discussion, is as follows: "Every person who makes, or knowingly has in his possession, any die, plate, or any apparatus, paper, metal, machine, or other thing whatever, made use of in counterfeiting coin current in this state, or in counterfeiting gold-dust, gold or silver bars, bullion, lumps, pieces, or nuggets, or in counterfeiting bank notes or bills, is punishable by imprisonment in the state prison not less than one nor more than fourteen years; and all such dies, plates, apparatus, paper, metal, or machine, intended for the purpose aforesaid, must be destroyed."

The suggestion is made that the legislature, when it used the words "bank notes or bills," did not mean to include any foreign bank notes or bills. And in support of this, it is ingeniously and strenuously argued that such intention could not have existed on the part of the law-making body, or else it would have used more apt and certain language upon the subject, such as had been formerly employed in prior laws, and in the New York code, upon which our Penal Code is modeled.

However plausible the argument may be, we cannot suppose that the legislature intended, by the comprehensive words "bank notes and bills," to mean less than all bank notes and bills, both foreign and domestic, current in this state, or otherwise. To say to the contrary would be to declare, without proper foundation, that the legislative assembly of our state had deliberately made California an asylum for all those evil-disposed persons who might desire to injure the currency of foreign nations, or to defraud our own citizens by passing off, upon, or selling to them counterfeit bills of such nations. Without some more direct and positive declaration of legislative intent to that end than has been shown in the argument of appellant, we should be very much averse to the belief which he so much desires us to entertain in his behalf.

Nor was it necessary that the information should have alleged the incorporation of the Bank of England. The fact of incorporation was not an element of the crime: *People v. Ah Sam*, 41 Cal. 652; *People v. Henry*, 77 Id. 445; Pen. Code, sec. 959, subd. 6, and sec. 960.

"So, too, as a matter of identity, we think the description is satisfied by proof that the company is known as a corporate company, and is acting as such, and as such issues bills which come within the statute": *People v. Ah Sam*, 41 Cal. 652.

A painstaking and lengthy argument is made that the federal courts have exclusive jurisdiction of this crime since the enactment of section 711 of the Revised Statutes of the United States, which reads as follows: "The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned shall be exclusive of the courts of the several states,—

"1. Of all crimes and offenses cognizable under the authority of the United States."

That provision of law was in existence when the supreme court of the United States, through Mr. Chief Justice Waite, delivered its opinion in the case of *United States v. Arjona*, 120 U. S. 479—488. This was a case where the defendant had been indicted for the violation of sections 3 and 6 of the act of Congress of May 16, 1884, chapter 52, 26 Statutes, 22, "To prevent and punish the counterfeiting within the United States of notes, bonds, and other securities of foreign governments." The statute, among others, makes the following things criminal:—

"Sec. 6. Having in possession any plate, or any part thereof, from which has been printed, or may be printed, any counterfeit note, bond, obligation, or other security, in whole or in part, of any foreign government, bank, or corporation, except by lawful authority," etc.

After holding that the law in question was constitutional, and that the offense is one which the United States government may denounce, in the performance of a duty toward other nations, that tribunal observed: "A right secured by the law of nations to a nation or its people is one the United States, as the representative of this nation, are bound to protect. Consequently, a law which is necessary and proper to afford this protection is one that Congress may enact, because it is one that is needed to carry into execution a power con-

ferred by the constitution on the government of the United States exclusively. There is no authority in the United States to require the passage and enforcement of such law by the states. Therefore the United States must have the power to pass it and enforce it themselves, or be unable to perform a duty which they may owe to another nation, and which the law of nations has imposed on them as part of their international obligations. This, however, does not prevent a state from providing for the punishment of the same thing; for here, as in the case of counterfeiting the coin of the United States, the act may be an offense against the authority of a state as well as that of the United States."

Although the point did not arise, and was not made in that case, that the federal jurisdiction was supreme and exclusive, and a state could not provide for the punishment of the same thing as did the United States, yet the language of that court is directly decisive of and against the objection made here, and we should respect it as the opinion of the tribunal of last resort as to such matters, which must be the final and supreme arbiter as to the jurisdiction of federal courts.

The language of the chief justice was evidently used for a purpose, to the end that a principle relative to the police powers of a state which had been settled by the supreme court of the United States, over which he then most ably presided, in prior adjudications should be still more firmly established; that is, that for violation of the federal laws the federal courts alone have jurisdiction. But that such acts, although denounced by federal laws, and punishable under such laws in federal courts alone, may nevertheless be punished by state laws in state courts, where the punishment of such acts pertain to the police power of a state; that for such an act as here alleged to have been committed, the federal law may punish, for the protection of foreign nations and their people, and the state law for the act as one which may result in a fraud upon its citizens by passing upon them counterfeit bills of a foreign bank or corporation.

In *Prigg v. Pennsylvania*, 16 Pet. 625, in asserting the exclusive power of Congress over the subject of fugitive slaves, Justice Story observes: "To guard, however, against any possible misconstruction of our views, it is proper to state that we are by no means to be understood in any manner whatsoever to doubt or to interfere with the police power belonging to the states in virtue of their general sovereignty. That police

power extends over all subjects within the territorial limits of the states, and has never been conceded to the United States."

In *Eells v. People*, 4 Scam. 512, Eells had been indicted under a statute of Illinois making it an offense to harbor and secrete a negro slave. The court said, by Mr. Justice Shields: "This [the state law] prescribes a rule of conduct for our own citizens. If the state can do this, and I hardly think the power questionable, it can punish those who violate the rule. If a state has power to regulate its own affairs, it has the power to define offenses and punish offenders. It is also said that this law may punish a man twice for the same offense. There is no force whatsoever in this objection. The offenses are separate and distinct; violations of distinct and different laws, and the punishment inflicted by different sovereignties": *Eells v. People*, 4 Scam. 512.

This case was afterward affirmed in *Moore v. People*, 14 How. 19, by the supreme court of the United States, where it was said: "But admitting that the plaintiff in error may be liable to an action under the act of Congress for the same acts of harboring and preventing the owner from retaking his slave, it does not follow that he would be twice punished for the same offense. . . . The same act may be an offense or transgression of the laws of both" (state and United States), for which, as afterward said, the offender may be justly punishable. It was there, in addition, said: "The power to make municipal regulations for the restraint and punishment of crime, for the preservation of the health and morals of her citizens, and of the public peace, has never been surrendered by the states or restrained by the constitution of the United States": *Moore v. People*, 14 How. 18.

In the case of *United States v. Marigold*, 9 How. 569, Mr. Justice Daniel, speaking for the court, says: "This court, in the case of *Fox v. Ohio*, 5 How. 432, have taken care to point out that the same act might, as to its character and tendencies and the consequences it involved, constitute an offense against both the state and the federal governments, and might draw to its commission the penalties denounced by either, as appropriate to its character in reference to each."

In the case of *United States v. Cruikshank*, 92 U. S. 542, Mr. Chief Justice Waite, in discussing the subject of citizenship of the state and of the United States, disposes of the question in a statement, as we think, clear to demonstration: "The people of the United States resident within any state

are subject to two governments,—one state and the other national; but there need be no conflict between the two. The powers which one possesses the other does not. They are established for different purposes, and have separate jurisdictions. Together they make one whole, and furnish the people of the United States with a complete government, ample for the protection of all their rights at home and abroad. True, it may sometimes happen that a person is amenable to both jurisdictions for one and the same act. Thus, if a marshal of the United States is unlawfully resisted while executing the process of the courts within a state, and the resistance is accompanied by an assault on the officer, the sovereignty of the United States is violated by the resistance, and that of the state by the breach of peace in the assault. So, too, if one passes counterfeited coin of the United States within a state, it may be an offense against the United States and the state: the United States, because it discredits the coin; and the state, because of the fraud upon him to whom it is passed. This does not, however, necessarily imply that the two governments possess powers in common, or bring them into conflict with each other. It is the natural consequence of a citizenship which owes allegiance to two sovereignties, and claims protection from both. The citizen cannot complain because he has voluntarily submitted himself to such a form of government. He owes allegiance to the two departments, so to speak, and within their respective spheres must pay the penalties which each exacts for disobedience to its laws. In return, he can demand protection from each within its own jurisdiction."

The defendant here is not sought to be punished under any federal statute as such. He has been tried and convicted in a state court, under a state law having for its object the prevention of the passing to her citizens fraudulently, and to their damage, of counterfeit bank notes of a foreign bank.

The state is not inhibited from passing laws to punish an act which may result in fraudulent imposition upon its citizens, because the federal government has the exclusive right to punish for an infraction of its laws made in consequence of a duty it owes under the law of nations. The act is the same for which the person is punished, but the laws are different and for a different purpose. The state could not punish for an infraction of the federal statute, but can do so as to its own statutes, when the object is to exercise the police power

which appertains to it under the constitution of the United States. This is not an attempted nullification of a federal statute, or an effort to enforce it in a state court; it is a law to prevent frauds upon the citizens of the state, and has nothing to do with the purpose or enforcement of the federal law.

It is also pressed upon our consideration that the charge of the court in reference to what constituted possession of the plate or block, in order to bring the defendant's act within the denunciation of the statute, was erroneous.

It is claimed that the decision of the appellate court in the case of Ah Sam, *supra*, which was given to the jury by the court as part of its charge upon the question of possession, was not applicable to the case in hand; that it went only to the point of declaring that an intention to use such a block was enough without a potential intention, and that it was not a decision on the meaning of the word "possession," as used in section 480 of the Penal Code.

There is no clearer or better way that occurs to us by which this argument may be successfully refuted than to quote here the language of Justice Temple in that case, in 41 Cal. 654, in which the facts relating to the guilty possession were in all essential features similar to those in the case at bar (all italicized words being our own).

"There is but one other question in this case which we think it worth while to notice. That arises upon this state of facts, as appears from the bill of exceptions: The blanks, the possession of which is charged in the indictment, were printed by one Baker, who, before printing them, revealed the matter to the city police, and had an arrangement with them by which the police should be in ambush ready to seize the defendants and the blanks immediately after they had been handed to them by Baker. Baker had from the police assurance that the blanks would be paid for, and without such assurances he would not have printed them. The ambush was laid according to the arrangement, and upon a signal being given by Baker, according to an understanding between him and the police, the latter appeared and seized Ah Sam and Ah Tuck, and took from them the impressions soon after they had come into their hands.

"It is claimed that the defendants never had such a possession of the blanks as is contemplated by the statute; that they were printed for the police, under a contract with them, and were really delivered to them according to contract, and were the

property of the police; that the mere handing of them to the defendants, to be immediately taken away by the real owners, was no more than laying them upon a counter for them to take. They were given to the defendants at the request of the police, and remained, during all the time they were in defendants' hands, completely under the control of the police; *that the defendants did not have them as their property*, and during the time they held them, could not have intended to pass them; *that they must have had the ability to commit the offense*, as well as the intention, *and that ability they never had any more than they would have when immured in a dungeon*; that the intention meant by the statute is potential, and not a mere desire which there are no means to effectuate, and which does not and cannot result in any act; *that Baker and the police never parted with the possession of the blanks, but determined not to do so, and all the time supervised the handling of them by the defendants.*

"The police laws cannot be tested by any such metaphysical niceties as these. The problem proposed is similar, if not the same, as that which baffled the best intellects of the world of all ages in attempting to reconcile the foreknowledge and providence of divinity with the freedom and the moral responsibility of man. The law adopts the theory of responsibility of man, notwithstanding the controlling supervision of Providence.

"The defendants were not under duress nor compelled by the police, *prior to the arrest, to do anything whatever.* They contracted with Baker for the blanks as freely and as completely as though the authorities had not permitted them to do so. They had absolute control of their own actions when *they received the blanks*, and up to the very time they were arrested. The knowledge or intention of the police did not interfere with their freedom prior to that time. They had *the ability to commit the crime as fully as they would have had if the police had arrested them at the same time*, without any understanding with Baker, and upon mere suspicion. . . .

"To constitute the crime, the law only requires the guilty possession. . . .

"Although Ah Sam was a mere *messenger*, he was properly convicted if he knew the purposes for which the blanks were designed."

We conclude that the possession of the defendant, under

the facts of this case, was a guilty possession, and the instructions of the court were in accordance with law.

Perceiving no prejudicial error in the record, we advise that the judgment and orders be affirmed.

VANCLIEF, C., and BELCHER, C. C., concurred.

The COURT. For the reasons given in the foregoing opinion, the judgment and orders are affirmed.

COUNTERFEITING. — State courts can punish the crime of counterfeiting coins of the United States, or of bringing counterfeit coins into the United States with intent to utter them: *Commonwealth v. Fuller*, 8 Met. 313; 41 Am. Dec. 509; *State v. Pitman*, 1 Brev. 32; 2 Am. Dec. 645; *State v. Tuth*, 2 Bail. 44; 21 Am. Dec. 508.

[IN BANK.]

NEWMAN v. BANK OF CALIFORNIA.

[80 CALIFORNIA, 368.]

ONE TENANT IN COMMON MAY MAINTAIN AN ACTION AGAINST A TRESPASSER for the whole property.

A TENANT IN COMMON WHO SUES A TRESPASSER, AND THEREBY RECOVERS POSSESSION OF THE PROPERTY, must thereafter be regarded as in possession from the time he brought his action, and the defendant must therefore be regarded as out of possession from the same time.

JUDGMENT FOR ONE CO-TENANT, WHEN INURES TO THE BENEFIT OF ANOTHER. — Recovery of judgment for possession by one tenant in common against a trespasser, and its subsequent enforcement, inure to the benefit of the other co-tenants. Hence, the possession of such trespasser, after the commencement of such suit, cannot give him a prescriptive title as against another tenant in common who did not sue.

George A. Nourse, for the appellants.

T. M. Osmont, for the respondent.

WORKS, J. The appellants and one Chapman were the owners as tenants in common of the real estate in controversy. The respondent Quinn was in possession, claiming to be the owner of the whole of the property, and holding the same adversely. Before the statute of limitations had run, Chapman brought his action against Quinn, alleging that he, Chapman, was the owner of the undivided one half of the property; that Quinn was in possession thereof without right, and had no right, title, or interest therein, and asking for the possession of the whole of the property.

The court below found the facts as alleged in the complaint, and rendered judgment in favor of Chapman that he was the owner of the undivided half of the property; that Quinn had no right, title, or interest in any part thereof; and that Chapman recover possession of the whole of the property.

Quinn appealed to this court, and the judgment was affirmed: *Chapman v. Quinn*, 56 Cal. 266. He then appealed to the supreme court of the United States, with the same result: *Quinn v. Chapman*, 111 U. S. 445.

Upon the final determination of the case, a writ of possession was issued upon the judgment, and Quinn was ousted, and Chapman put in possession of the land.

Between the time of the bringing of Chapman's suit and his being put into actual possession under the writ, the time necessary to give Quinn title by adverse possession, if undisturbed, as against the appellant, had fully run.

The sole question presented here is, whether the bringing of the action by Chapman, one of the tenants in common, in the manner above stated, and his recovery of the possession, had the effect to prevent the possession of Quinn ripening into a title to the property as against the appellants, the other tenants in common.

Counsel for respondents contends that there is no privity between tenants in common, and that the commencement of an action by one cannot inure to the benefit of another, as against the statute of limitations, and that a judgment recovered by him affects his interest in the property alone.

In support of these propositions, he cites *Chipman v. Hastings*, opinion of this court, December 8, 1873, unreported; *Read v. Allen*, 56 Tex. 176, 182; *Stovall v. Carmichael*, 52 Id. 383; *Burleson v. Burleson*, 28 Id. 385, 417; *Pendergrast v. Gallatt*, 10 Ga. 224; *McFarland v. Stone*, 17 Vt. 175; 44 Am. Dec. 325; *Wade v. Johnson*, 5 Humph. 118; 42 Am. Dec. 422; *Bronson v. Adams*, 10 Ohio, 135; *Gray v. Givens*, 26 Mo. 303; *Doolittle v. Blakesley*, 4 Day, 273; 4 Am. Dec. 218; *Hammitt v. Blunt*, 1 Swan, 385; *Walker v. Perryman*, 23 Ga. 309, 315; *Mobley v. Bruner*, 59 Pa. St. 481; 98 Am. Dec. 360; *Bennett v. Hethington*, 16 Serg. & R. 196; *Roe v. Rowson*, 2 Taunt. 446.

It is contended that the unreported case of *Chipman v. Hastings* is conclusive of the question in favor of the respondents; and so it would be but for the fact that a rehearing was granted in the case, and upon a second hearing the question

was not decided, or in effect decided the other way: *Chipman v. Hastings*, 50 Cal. 310.

Counsel for appellants concedes that the judgment recovered by Chapman did not inure to the benefit of his clients, but contends that as he finally recovered possession, such possession related back to the time of bringing his action; and under the well-established rule that the possession of one tenant in common is the possession of all, the appellants must be regarded as having been in possession, and the respondent Quinn to have been ousted at the time such action was commenced.

We think the learned counsel for appellants has conceded too much. If the judgment of Chapman did not inure to the benefit of the appellants, their title is undoubtedly lost by adverse possession. It is only by the aid of such judgment that his position that Quinn was in contemplation of law out of possession from the time the action was commenced can be maintained.

The complaint of Chapman against Quinn presented two questions for litigation, viz., the title to the undivided half of the property, and the right to the possession of the whole thereof. Quinn might have defeated the action entirely by proving that Chapman had no title to the property. He might have defeated a recovery of the undivided half of the land not claimed by Chapman, by showing that he, Quinn, was the owner, or entitled to the possession of the same. He did neither. Therefore the judgment in that case is, as between him and Chapman, conclusive against him that he was a mere trespasser upon the land at the time the action was commenced, and that Chapman, as one of the tenants in common of the property, was then entitled, as against him, to the possession of the whole thereof. If Chapman had, as such tenant in common, gone into the actual possession at that time, his possession would have been that of all of the owners, and they would, in contemplation of law, have been in possession. Did his recovery of possession under the circumstances have the same effect? One tenant in common may maintain a separate action to recover possession of his interest in the property. In such case, his title and right to possession alone is involved, and the judgment cannot operate for or against the other owners: *Williams v. Sutton*, 43 Cal. 71; *Walker v. Perryman*, 23 Ga. 309. But such tenant may maintain an action against a mere trespasser for the possession of the whole of the prop-

erty: *Williams v. Sutton*, *supra*; *Chipman v. Hastings*, 50 Cal. 310.

The right to recover the whole might have been defeated by a showing that at the time the suit was brought the defendant had acquired the title of the other owners by deed, estoppel, the statute of limitations, or otherwise, as one tenant in common may be barred of his rights, and another not: *McFarland v. Stone*, 17 Vt. 178; 44 Am. Dec. 325; *Bronson v. Adams*, 10 Ohio, 136.

It may be conceded, also, though we do not decide it, that, as to any claim of title existing at the time the suit was commenced against those defendants not suing, the defendant in that action was not concluded, as between him and the tenants not suing.

But the question here is quite a different one. Can he obtain title by possession subsequent to the bringing of the action, when the right to such possession, not only as to a part but as to the whole of the land, is put in issue in the case, and finally determined against him? We are quite clear that he cannot. As between him and Chapman, the judgment determines that he was, from the time the action was commenced, in the wrongful possession of the property, and, as between them, this question of the right to such possession relates to the time the suit was brought, and from that time, as between them, his possession conferred no title. The effect of the judgment, and the enforcement thereof by the writ of possession, was to make Quinn's possession of the whole tract the possession of Chapman from the time the action was commenced. If not, Quinn could have resisted the enforcement of the writ by saying, "I had no title to the undivided half of the property not claimed by you when you recovered your judgment, but I have since obtained it by remaining in possession; therefore, you are not now entitled to the possession of that half, but only to the possession jointly with me as your tenant in common." This he certainly could not do as against Chapman.

Now, if, in contemplation of law, Chapman was in possession from the time he commenced his action, for the same reason Quinn must be regarded as out of possession. Chapman's possession was the possession of the appellants: *Unger v. Mooney*, 63 Cal. 568; 49 Am. Rep. 100; *Olney v. Sawyer*, 54 Cal. 380.

Therefore, they were in possession, and the statute of limitations could not run against them.

So far the judgment of Chapman, and subsequent proceedings under it, inured to the benefit of the appellants and preserved their title.

While the cases cited by the respondent support the general doctrine that a judgment for or against one tenant in common does not affect the rights of his co-tenants, they do not reach the question presented here. Some of the language used may be so construed as, in general terms, to cover the question under consideration, but they do not determine it.

In some of the cases the doctrine that a judgment recovered by one tenant in common does not inure to the benefit of another is placed upon the express ground that he cannot recover the possession of the whole property, but only his own undivided share: *Mobley v. Bruner*, 59 Pa. St. 483; 98 Am. Dec. 360; *Bennett v. Hethington*, 16 Serg. & R. 196; *Gray v. Givens*, 26 Mo. 291, 302.

The conclusion reached must necessarily follow from such a rule, as the right of possession as to the interest of other owners is not involved or determined. But, as we have seen, the rule is the other way in this state.

In some of the cases cited the right of one tenant in common to recover the whole of the land from a mere trespasser is recognized, and those cases tend to confirm the conclusion we have reached, but are not decisive of the question: *Read v. Allen*, 56 Tex. 176, 182; *Read v. Allen*, 56 Id. 182, 190; *Stovall v. Carmichael*, 52 Id. 388; *Pendergrast v. Gallatt*, 10 Ga. 218, 224; *McFarland v. Stone*, 17 Vt. 165, 175; 44 Am. Dec. 325.

For the reasons stated, we think the court below erred in holding the respondent Quinn to be the owner of the undivided half of the land.

Judgment reversed, with instructions to the court below to modify its conclusions of law in accordance with this opinion, and to render judgment on the findings in favor of the appellants.

CO-TENANCY. — Possession of one co-tenant is possession of all the tenants in common: *Page v. Branch*, 97 N. C. 97; 2 Am. St. Rep. 281, and note 284; *Hudson v. Coe*, 79 Me. 83; 1 Am. St. Rep. 288; and entry by one co-tenant inures to the benefit of all: *Hudson v. Coe*, 79 Me. 83; 1 Am. St. Rep. 288, and note; *Rodney v. McLaughlin*, 97 Mo. 426.

CO-TENANCY. — Action by one co-tenant against a third person: See *Pack v. McLean*, 36 Minn. 228; 1 Am. St. Rep. 665, and cases in note 669. One tenant in common may recover the whole estate against a stranger: *McFarland v. Stone*, 17 Vt. 165; 44 Am. Dec. 325. One co-tenant cannot recover

in ejectment for the benefit of all the co-tenants, but he can recover his aliquot part of the common property: *Mobley v. Bruner*, 59 Pa. St. 481; 98 Am. Dec. 360, and note 363. One co-tenant may maintain an action in trespass to try title for the recovery of the entire common property against a trespasser: *Telfener v. Dillard*, 70 Tex. 139; but see *Les v. Turner*, 71 Id. 264; *Becnel v. Waguessack*, 40 La. Ann. 109.

CO-TENANCY. — STATUTE OF LIMITATIONS may run against the estate of one co-tenant without affecting such other co-tenants as are under disabilities: *McFarland v. Stone*, 17 Vt. 165; 44 Am. Dec. 325, and note 323.

TAPPAN v. ALBANY BREWING COMPANY.

[50 CALIFORNIA, 570.]

CONFIRMATION OF SALE — AGREEMENT NOT TO RESIST. — AGREEMENT BETWEEN A PURCHASER AT A PARTITION SALE AND A TENANT IN COMMON, who believes that the common property has been sold for much less than its value, that the latter will not object to such sale, and will permit it to be confirmed by the court, and that the former will thereupon pay the latter one thousand dollars, is a fraud upon the court and the parties to the action, and no court will aid either party to enforce it.

N. D. Anderson, for the appellant.

Thomas H. Smith, for the respondent.

WORKS, J. The complaint in this case alleges, in substance, that an action for partition of certain real estate having been brought, judgment was rendered, decree for the sale of the property entered, and the property sold to the defendant; that the property was sold for much less than its real value; that the plaintiff's assignor, who was one of the defendants, and a tenant in common of the real estate, being dissatisfied with the price at which the property was sold, was about to commence proceedings to prevent the confirmation of the sale by the court; that the defendants, to induce her not to make such objections, agreed to pay her one thousand dollars additional for her interest in the property immediately upon the sale being confirmed, and that she, relying upon such promise, and in consideration thereof, refrained from making objections to the confirmation of said sale, and that no objection being made, the sale was duly confirmed.

The defendant paid one hundred dollars of the amount, and this action is to recover the balance of nine hundred dollars.

The court below overruled a demurrer to the complaint, and the defendant failing to answer, judgment was entered against it, and it appeals.

The demurrer should have been sustained. The contract was a fraud, not only upon the court, whose duty it was to pass upon and confirm or set aside the sale, but upon the parties in the action of partition. It was the plain duty of the plaintiff's assignor, if she knew of any valid reason why the sale should have been set aside or not confirmed, to make it known to the court and her co-defendants.

It is contended by the respondent that this was nothing more than the payment of a sum of money by way of a compromise of litigation, and that such contracts have been upheld. We do not so construe the agreement. It was a promise to pay a consideration for the concealment of a fact from the court and the parties material to the rights of said parties, and which it was her duty to make known. Such a contract was against public policy, and neither party should receive the aid of the courts to enforce it: *Beard v. Beard*, 65 Cal. 356.

The judgment is reversed, with instructions to the court below to sustain the demurrer to the complaint.

JUDICIAL SALES. — Any act preventing competition among bidders at a sale, on the part of the auctioneer, or the persons causing the sale, vitiatos such sale: *Farr v. Sims*, Rich. Eq. Cas. 122; 24 Am. Dec. 396; *Jenkins v. Frost*, 30 Cal. 586; 89 Am. Dec. 134.

AGREEMENT OF LIEN CREDITORS, whereby some of them are not to bid at a sale of the property to enforce their liens, is against public policy, though each property is not of sufficient value to satisfy the liens: *Barton v. Benson*, 126 Pa. St. 431; 12 Am. St. Rep. 882.

TREADWELL v. WHITTIER.

[80 CALIFORNIA, 575.]

DAMAGES, GENERAL AND SPECIAL, WHAT ARE. — Damages which necessarily result from the act complained of are denominated general damages, and may be proved under the *ad damnum* clause or general allegation of damages, while those which are the natural consequences of the act complained of, and not the necessary result of it, are termed special damages.

DAMAGES NOT NECESSARILY RESULTING FROM THE ACT DONE MUST BE SPECIALLY PLEADED, or the plaintiff will not be permitted to give evidence of them at the trial.

DAMAGES FOR PERMANENT LOSS AND INJURY, SPECIAL PLEADING OF. — The court may instruct the jury to take into consideration permanent loss and injury arising to plaintiff from the injuries set out in the complaint which render him less capable of attending to his business than he would have been if the injury had not been received, where the extent and nature of the plaintiff's injuries are alleged in the complaint, and they are such as must necessarily render him less able to attend to

his business than before. The future effect of injuries is not special damages, which must be alleged, but general damages, which necessarily flow from injuries received.

NEGLIGENCE — BURDEN OF PROOF. — When plaintiff shows that he has been injured by the breaking of machinery which was under the control and management of the defendant, he makes out a case which entitles him, if not rebutted, to recover from the defendant. The burden is then thrown on the defendant to show that he was not guilty of negligence for which he must be charged.

PASSENGER-ELEVATOR. — A PERSON INJURED BY THE BREAKING of the machinery of a passenger-elevator has a right to recover against the persons by whom it was controlled, in the absence of evidence on the part of the defendant showing that he was free from fault or neglect.

INSTRUCTIONS — PROOF TO A MORAL CERTAINTY. — Defendants are not entitled to have a jury instructed that their fault or negligence must be established to a moral certainty when the jury have already been told by the court "that plaintiff, in order to recover in this action, must prove to your satisfaction that defendants have been guilty of some fault or negligence, and must also prove what that fault or negligence was, and this plaintiff must do by a preponderance of evidence." The effect of such instruction is the same as if the jury had been instructed that they must be convinced by the evidence to a moral certainty.

ELEVATORS. — THE CARE AND DILIGENCE EXPECTED OF PERSONS USING AN ELEVATOR IN THEIR PLACE OF BUSINESS is the same as that resting on carriers of passengers by a coach or railway; and the latter are liable for the slightest neglect in regard to the vehicles provided for them, and are held to extraordinary diligence and care in their management.

CARRIER OF PASSENGER IS BOUND TO THE UTMOST CARE AND DILIGENCE OF CAUTIOUS PERSONS, and is responsible for any, though the smallest, neglect. His undertaking is to carry his passengers with safety, as far as human power and foresight can do so.

ELEVATORS. — A PERSON RUNNING AN ELEVATOR IN HIS PLACE OF BUSINESS must be held to undertake to carry safely persons riding therein as fully as human care and foresight can do.

CARRIERS OF PASSENGERS MUST USE THE UTMOST CARE AND DILIGENCE IN PROVIDING safe, suitable, and sufficient vehicles for the conveyance of their passengers.

CARRIER OF PASSENGERS IS RESPONSIBLE FOR DEFECTS WHICH MIGHT HAVE BEEN DISCOVERED by the most careful and thorough examination.

ELEVATOR, TESTING. — IF AN ACCIDENT IS CAUSED BY A DEFECT OR FAULT in one of the piston-rods of an elevator, the owner thereof is answerable to the person injured thereby, unless such defect or fault could not have been discovered on a reasonable and careful examination according to the best known tests reasonably practicable.

ELEVATORS, MANUFACTURER'S WANT OF CARE AND SKILL — OWNER OF ELEVATOR IS NOT EXCLUDED FROM THE DEGREE OF CARE AND DILIGENCE otherwise exacted of him by the fact that the elevator in use was constructed by a competent and skillful manufacturer, from whom it was purchased. Such manufacturer is a mere agent and servant in the construction of the elevator, for whose want of care the owner of the elevator becomes responsible. The obligation of care and foresight rests on the person using the elevator, and he cannot shift it from himself to another person.

ELEVATORS — INSTRUCTIONS. — In an action to recover for injuries sustained in an elevator accident, the following instruction is not erroneous: "That the defendants owed it as a duty to the persons using the elevator in their store, either as customers or by their invitation or request, to use all reasonable means and efforts to furnish good and well-constructed machinery, adapted to the purposes of its use, of good material, and of the kind which is found to be safest when applied to use; and while they were not required to seek and apply every new invention, they must adopt such as are found by experience to combine the greatest safety with practical use."

OWNERS OF ELEVATORS MUST KEEP PACE WITH SCIENCE, ART, AND MODERN IMPROVEMENT in supplying safe vehicles, machinery, and appliances for their use.

ELEVATORS, WARNING GIVEN TO OWNERS OF. — EVIDENCE in an action to recover for injuries received for an elevator accident may be received to show that the defendants had been told that they were operating the elevator carelessly and were not exercising more care, because it tends to establish that the defendants knew that they were operating it carelessly and incautiously.

McAllister and Bergin, D. M. Delmas, and S. C. Denson, for the appellants.

Lloyd and Wood, and Garber and Bishop, for the respondent.

THORNTON, J. The plaintiff brought this action to recover damages for injuries to his person, caused by the falling of an hydraulic elevator operated by defendants in their store, on which he (plaintiff) was riding at the time. The cause was tried before a jury. Verdict and judgment passed for plaintiff, and the defendants prosecute this appeal from the judgment, and from an order denying their motion for a new trial.

The action is based on the negligence of the defendants in using the elevator with broken, insecure, and insufficient machinery, in not taking proper care of such machinery, and in the running and operating of the elevator, in consequence of which the plaintiff, without any fault or negligence on his part, received the injuries of which he complains.

We insert here the averments of the complaint specifically setting forth the cause of action:—

"That defendants are, and at all times hereinafter mentioned were, copartners in business, using trade and commerce at the city and county of San Francisco under the firm name and style of Whittier, Fuller, & Co.

"That the said defendants as copartners did at the times hereinafter mentioned conduct and carry on business in a building at the southwest corner of Pine and Front streets, in said city and county, comprising three stories, or floors, and a

basement, and the defendants at said times had owned and maintained an elevator, or hoist, operated by machinery, situated in the basement of said building, and wholly under the control and management of the said defendants and in their exclusive use, which said hoist or elevator was used and intended to be used by defendants for the purpose of transporting and carrying their customers, and those in said building for the purpose of trading with them, or such persons as they might request to be so transported, and their merchandise, to and from the different floors or stories of said building.

"That heretofore, to wit, on the twenty-third day of December, 1878, this plaintiff, being lawfully in the said store or building of the defendants as a customer, and for the purpose of trading with defendants, was requested by the said defendants to get upon the said hoist, or elevator, for the purpose of being carried from the upper or third floor of said building to the lower or street floor thereof; and then and there the said plaintiff, in pursuance of such request, got into the said elevator, or hoist, for the purpose aforesaid, and immediately thereupon, when the said defendants undertook to transport or lower the said plaintiff from the said upper or third floor to the lower or street floor of their said store, the said hoist, or elevator, by reason of the broken, insecure, and insufficient machinery by which the same was run, and by reason of the negligent and careless conduct of the defendants in the care of the said machinery, and in the running and operating of the same, and in the running and operating of the said hoist or elevator, without any fault or negligence on plaintiff's part whatsoever, was precipitated from said upper or third floor into the basement of said building with great and excessive rapidity and violence, and the plaintiff was thereby greatly bruised, broken, damaged, and injured in his body and limbs, and became and was thereby made sick, sore, lame, and disordered, and so remained for a long space of time, to wit, from thence hitherto, and said plaintiff sustained a fracture of his left leg in the ankle-joint, and was otherwise seriously injured, so that he was confined to his bed for a long period of time, to wit, three months, and was thereafter for a period of four months unable to walk, save with crutches, and his said left leg, by reason of said fracture, is and always will be shorter than his other or right leg, and the plaintiff has sustained other and internal injuries from which he can never recover, and the same will and do permanently affect and impair the

health, strength, and activity of plaintiff, and said plaintiff, for a long period of time, to wit, ever since said accident, has suffered great pain of body and anguish of mind.

"That plaintiff, at the time aforesaid, had no notice or knowledge that the machinery whereby the said elevator, or hoist, was run or operated was out of order, or broken, or insecure, and defendants had full notice and knowledge thereof."

On the argument and in the briefs, several points were and are elaborately discussed and presented for consideration and determination. To the consideration of these points we proceed in the order in which they were presented by counsel for defendants (appellants here) on the oral argument.

1. It is argued that the court erred in giving the tenth instruction requested by the plaintiff. That instruction was given in these words: "If, under the evidence and instructions of the court, the jury find for plaintiff, then, in assessing the plaintiff's damages, the jury may take into consideration, not only the loss and immediate damage arising from the injuries received at the time of the accident, but also the permanent loss and damage, if any is proved, arising from any disability resulting to the plaintiff from the injury in question, which renders him less capable of attending to his business than he would have been if the injury had not been received."

It is said by counsel for defendants that the loss or impairment of the capacity to attend to business is in the nature of special damages, and must, as such, be specially pleaded; that if not specially pleaded, no evidence can be introduced to show diminished capacity for business, nor any inquiry legitimately made in respect to it.

The allegation of damage in the complaint has been quoted above at large. It is averred and set forth by plaintiff that by reason of his fall he was greatly bruised, broken, damaged, and injured in his body and limbs, and became and was thereby made sick, sore, lame, and disordered, and so remained up to the time of action brought; that he sustained a fracture of his left leg in the ankle-joint, and was otherwise seriously injured, so that he was confined to his bed for three months, and for a period of four months thereafter was unable to walk except with crutches; that his left leg, by reason of the fracture, is and always will be shorter than his right leg; that he sustained other and internal injuries from which he will never recover, and the same will and do permanently affect and impair his health, strength, and activity; and that

ever since the fall he has suffered great pain of body and anguish of mind.

Damages which necessarily result from the act complained of are denominated general damages, and may be proved under the *ad damnum* clause or general allegation of damage, while those which are the natural consequences of the act complained of, and not the necessary result of it, are termed special damages.

The defendant must be presumed to be aware of the damages which necessarily result from the act done, and therefore he cannot be held to be taken by surprise when proof is offered of such necessarily resulting damage. But as to the damage naturally, though not necessarily, resulting from the act done, the defendant cannot be presumed to be aware of, and therefore, in order to prevent a surprise on defendant, it must be specially set forth in the complaint, or the plaintiff will not be permitted to give evidence of it at the trial. On this subject see Chitty's Pleading, 16th Am. ed., 348; 2 Greenl. Ev., sec. 254; *Stevenson v. Smith*, 28 Cal. 103; 87 Am. Dec. 107; *Potter v. Froment*, 47 Cal. 165; *Hunter v. Stewart*, 47 Me. 419.

Now, considering the physical injuries complained of and set forth in the complaint by plaintiff, viz., the fracture of his right leg, by reason of which it will always be shorter than his other leg, and that he has sustained other and internal injuries from which he can never recover, and which will permanently impair his health, strength, and activity, the court will not be straying from the rule above stated if it directs the jury, in assessing the amount of damages sustained by plaintiff, to take into consideration the permanent loss and damage, if any is proved, arising from any disability resulting to the plaintiff from the injury complained of, which renders him less capable of attending to his business than he would have been if the injury had not been received.

The court in this instruction only directed the jury to take into consideration, is assessing the damages, such as necessarily resulted from the injuries set forth in the complaint, if such injuries were proved by the evidence. That the injuries set forth will necessarily render a person less capable of attending to his business is clearly apparent, and no argument is needed to make it clear.

The conclusion here reached is sustained by the rulings in the following cases: *Morris v. C., B., & Q. R. R. Co.*, 45 Iowa, 30; *Conner v. Pioneer etc. Co.*, 29 Fed. Rep. 681; *Wade v. Le-*

roy, 20 How. 44; *Nebraska v. Campbell*, 2 Black, 592; *Elkhart v. Retter*, 26 Ind. 140; *Indianapolis v. Gaston*, 58 Id. 224; *Potter v. Metropolitan R. R. Co.*, 28 L. T., N. S., 735; *McKeever v. Market Street R. R. Co.*, 59 Cal. 294; *Bradbury v. Benton*, 69 Me. 199; *Baltimore etc. R. R. Co. v. Wightman*, 29 Gratt. 431, 440, 441; 26 Am. Rep. 384; *Tyson v. Booth*, 100 Mass. 266; *Roberts v. Graham*, 6 Wall. 578; *Ward v. Smith*, 11 Price, 19.

We refer particularly to the case of *Wade v. Leroy*, above cited. In that case the court said: "The evidence conducted to prove that the plaintiff was seriously injured." Subsequently in the opinion these observations were made: "That before that time he had been concerned in conducting a business that required a degree of mental and bodily vigor, and that his time was of some pecuniary value, or that he had suffered a loss of some profit; and that, after some detention in New York, he returned to his house in an infirm condition, — so infirm that his medical attendant and adviser deemed him incapable of pursuing any ordinary business occupation, and advised him to abstain from personal exertion."

"This evidence would certainly assist a jury to determine that the plaintiff has sustained an injury of no slight character, — an injury to his person which was followed by expense, suffering, and loss of time, which had for him a pecuniary value. These were the direct and necessary consequences of the injury, and sustained strictly and almost exclusively as an effect from it."

In *Bradbury v. Benton*, above cited, the action was for a personal injury, and no special damages were alleged. The point was as to the recovery of prospective damages. As to this the court, per Libby, J., said: "In legal contemplation, all damages which will be sustained as the effect of the injury are sustained immediately. The future effect of the injuries is not special damages, which must be alleged, but general damages, which necessarily flow from the injuries received: *Hunter v. Stewart*, 47 Me. 419. The declaration specifically describes the injuries received. It is sufficient to authorize a recovery of all damages which had been or would be sustained by the plaintiff as the natural and ordinary effect of the injuries."

We will remark here that in our judgment the words "his business," used in the instruction, referred to any business which plaintiff might undertake to carry out, and that there

is no difference in meaning between the words "his business" and "his ordinary business."

Plaintiff was entitled to the instruction as given, and the court committed no error in giving it.

2. The defendants requested the court to give the following instruction: "Plaintiff, in order to recover in this action, must prove to your satisfaction that defendants have been guilty of some fault or negligence, and must also prove what that fault or negligence was, and this plaintiff must do by a preponderance of evidence and to a moral certainty."

This instruction was refused by the court as asked, and to this refusal defendants excepted.

The court struck out the words at the end of the request "and to a moral certainty," and gave it as thus modified. To this defendants also excepted.

It is argued by defendants that they were entitled to have the instruction given as asked, by reason of the provisions of section 1826 of the Code of Civil Procedure. That section is as follows: "The law does not require demonstration; that is, such a degree of proof as, excluding possibility of error, produces absolute certainty; because such proof is rarely possible. Moral certainty only is required, or that degree of proof which produces conviction in an unprejudiced mind."

We are inclined to the opinion that giving the instruction as asked would have been error, and that the giving it as modified was also error.

The law does not put on the plaintiff the burden of proving, not only fault or negligence on the part of the defendants, but also "what that fault or negligence was." The law requires proof that plaintiff has sustained an injury by the breaking of the machinery by which he is carried or transported, and that such machinery was under the control and management of the defendant. When plaintiff has made such proof, he has made out a case which entitles him, if not rebutted or disproved, to recover of defendant. The plaintiff by such proof has made a case showing negligence on the part of defendant. The burden is then thrown on defendant to show that he was not guilty of negligence for which he could be charged. This he can do by going into proof of the manner in which the hurt occurred, and showing that it was caused by an inevitable causalty, for which the law imposed on him no responsibility, or by establishing any fact which relieved him of responsibility.

Take, for instance, the case of a passenger alleged to be injured by the negligence of a carrier in so carelessly driving a coach on which plaintiff was a passenger that it was overturned, and plaintiff was injured. The plaintiff only is called on to prove the overturning of the coach, and that he was hurt by it. This overturning the defendant is called on to show was not caused by his negligence at all. This he may show by direct proof that he was not negligent at all, or that the overturn occurred from some latent defect in the machinery, which broke and caused the overturn. The particular fault or negligence may come out on the evidence in the cause, but plaintiff is not required to prove what caused the overturn.

The above is virtually established to be law by two cases decided by this court. Reference is here made to *Boyce v. California Stage Co.*, 25 Cal. 468, and *Lawrence v. Green*, 70 Id. 420.

In this case, the plaintiff was only called on to show that he was hurt by the breaking of the machinery of the elevator by which he was injured. When this is done, he has made out a case, on which, there being no other evidence introduced, he has a right to recover.

The plaintiff is not called on to make any more particular proof. Doubtless there are exceptions to this rule, but this case is not one.

For the above reasons, we are inclined to think that the instruction asked and refused and the instruction as given were erroneous.

But conceding that the views above stated are not tenable, we are still of opinion that the court below, by its ruling, committed no error of which defendants can complain.

The defendants urge that they are entitled to the instruction that their fault or negligence should have been proved "to a moral certainty," under the provisions of section 1826 of the Code of Civil Procedure. That section is fully quoted above.

By this section that degree of proof is required to establish a matter in dispute which produces conviction in an unprejudiced mind. When the evidence is such as to produce conviction of the truth of a fact in an unprejudiced mind, such a fact is said to be established to a moral certainty. Such evidence is deemed to be satisfactory, and will justify a verdict. It is so declared in the Code of Civil Procedure by section 1835. When a matter is proved to the satisfaction of a jury

by a preponderance of evidence, then it can be affirmed that they are convinced of its truth; and being thus convinced of its truth, they can base a verdict on it: Code Civ. Proc., sec. 2061, subd. 5, and sec. 1835, *supra*. It follows from the foregoing that when the jury were told that the plaintiff, in order to recover in this action, must prove to their satisfaction that the defendants had been guilty of what was stated in the instruction complained of, by a preponderance of evidence, they were, in effect, told that they must be convinced, from the evidence, to a moral certainty, that defendants were so guilty, or the plaintiff was not entitled to recover. They could not be satisfied that the plaintiff had made such proof without being convinced of its proof to a moral certainty. The instruction as given was the equivalent of the requirements of section 1826 of the Code of Civil Procedure, and hence there was no error in the rulings of the court in regard to the request refused or the instruction given.

If there was any error committed by the court, it was in giving an instruction too favorable to defendants, of which they cannot be heard to complain.

3. Defendants contend that the court erred in modifying the instruction numbered nine, requested by them.

The instruction as asked by defendants was as follows: "If the accident in question was caused by a defect or flaw in one of the piston-rods of the elevator apparatus, which defect or flaw was not discoverable on an ordinary, reasonable, and careful examination, then your verdict should be for the defendants."

The court modified the instruction so as to read as follows: "If the accident in question was caused by a defect or flaw in one of the piston-rods of the elevator apparatus, which defect or flaw was not discoverable on a reasonable and careful examination according to the best known tests reasonably practicable, then your verdict should be for the defendants."

It is said by defendants that it was error for the court to insert the words "according to the best known tests reasonably practicable."

The defendants used their elevator in lifting persons vertically to the height of forty feet. That they were carriers of passengers, and should be treated as such, we have no doubt. The same responsibilities as to care and diligence rested on them as on the carriers of passengers by stage-coach or railway.

In *Fairchild v. California Stage Co.*, 18 Cal. 599, which was an action by a passenger against a stage-coach proprietor, it was held that proprietors of stage-coaches are not insurers or warrantors of the safety of passengers to the same extent as common carriers of goods, still they are liable for the slightest neglect, and are held to extraordinary diligence and care. The court cites sections 592 and 601 a of Story on Bailments, and *Farish v. Reigle*, 11 Gratt. 711, 62 Am. Dec. 666, where the same rule is laid down. As to the vehicle, Judge Story says, in section 592, of such proprietors: "They are bound to provide coaches reasonably strong and sufficient for the journey, with suitable harness, trappings, and equipments, and to make a proper examination thereof previous to each journey." And further: "Hence it has been held that if there is any defect in the original construction of a stage-coach, as, for example, in an axle-tree, although the defect be out of sight, and not discernable upon a mere ordinary examination, yet if the defect might be discovered by a mere minute examination, and any damage is occasioned thereby, the coach proprietors are answerable therefor. The same rule will apply to any other latent defect, which might be discovered by more minute examination and more exact diligence, whereby the work is not roadworthy, and a damage thereby occurs to any passenger." In section 601 a, Justice Story says that "the law will, in tenderness to human life and limb, hold the proprietors liable for the slightest negligence, and will compel them to repel, by satisfactory proofs, every imputation thereof."

In *Farish v. Reigle*, *supra*, the question was directly raised whether a stage-coach proprietor was responsible for more than ordinary diligence. The court unanimously held that he was. The court approved of the doctrines of Justice Story on this subject. In the cases cited, the court, speaking by Justice Daniel, said: "The liabilities of such carriers naturally flow from their duties. As they are not, like common carriers of goods, insurers against all injuries, except by the act of God, or by public enemies, the inquiry is naturally presented, What is the nature and extent of their responsibility? It is certain that their undertaking is not an undertaking absolutely to convey safely. But although they do not warrant the safety of passengers at all events, yet their undertaking and liability go to the extent that they and their agents possess competent skill, and that they will use all due care and diligence in the performance of their duty. But in what manner (the author

asks) are we to measure this due care and diligence? Is it ordinary care and diligence, which will make them liable only for ordinary neglect? Or is it extraordinary care and diligence, which will render them liable for slight neglect? As they undertake for the carriage of human beings, whose lives and limbs and health are of great importance, as well to the public as to themselves, the ordinary principles in criminal cases, where persons are made liable for personal wrongs and injuries arising from slight neglect, would seem (he says) to furnish the true analogy and rule. It has been accordingly held that passenger carriers bind themselves to carry safely those whom they [admit] into their coaches, as far as human care and foresight will go, that is, for the utmost care and diligence of very cautious persons; and of course they are responsible for any, even the slightest, neglect": Sec. 601.

"In section 601 a, the further proposition is stated, that 'when injury or damage happens to the passengers by the breaking down or overturning of the coach, or by any other accident occurring on the ground, the presumption *prima facie* is that it occurred by the negligence of the coachman, and the *onus probandi* is on the proprietors of the coach to establish that there has been no negligence whatever, and that the damage or injury has been occasioned by inevitable casualty, or by some cause which human care and foresight could not prevent; for the law will, in tenderness to human life and limb, hold the proprietors liable for the slightest negligence, and will compel them to repel by satisfactory proofs every imputation thereof.'"

This ruling in *Fairchild v. California Stage Co.*, 13 Cal. 599, was approved in *Boyce v. California Stage Co.*, 25 Id. 468, and *Lawrence v. Green*, 70 Id. 417, 420, 421.

It thus appears to be settled law in this state that a proprietor of stage-coaches is liable for the slightest negligence in regard to the vehicle provided by him; that he is responsible to his passenger for the utmost care and diligence of very cautious persons.

In *Rogers v. C. P. R. R. Co.*, 67 Cal. 608, it was said by the court: "Manifestly it was the duty of the defendant, a railroad company, to furnish alike to its passengers and employees a suitable and safe road, engines, cars, and appliances for conducting its business," etc.

Certainly the degree of care and diligence to be exercised by a stage-coach proprietor as to the vehicle to be provided by

him for the carriage of passengers is just as high as regards a railroad company and the cars or other machinery which it is to provide and furnish for such transportation. The railroad company is bound for the utmost care and diligence of very cautious persons, and is responsible for any, even the slightest, neglect. The same rule applies in both cases, and for the same reason, that each undertakes to carry human beings, whose lives and limbs and health are of great importance, as well to the public as themselves.

In *Maverick v. Eighth Avenue R. R. Co.*, 36 N. Y. 378, the rule is stated as well settled that "passenger carriers bind themselves to carry safely those whom they take into their coaches, as far as human care and foresight will go,—that is, to the utmost care and diligence of very cautious persons." The court cites *Brown v. New York Central R. R. Co.*, 18 Id. 408, and *Deyo v. New York Central R. R. Co.*, 34 Id. 9, 88 Am. Dec. 418, where the same rule is laid down.

In *Taylor v. Grand Trunk R. R. Co.*, 48 N. H. 313, 2 Am. Rep. 229, a large number of authorities are collected in an able opinion by Bellows, J. In this opinion it is declared: "The doctrine of the American courts is still more strict and explicit; and the general current of the authorities is, that the carrier of passengers is bound to the utmost care and diligence of very cautious persons, and is responsible for any, even the smallest, neglect; holding their undertaking to be to carry their passengers with safety as far as human care and foresight can go. This is distinctly laid down in Story on Bailments, secs. 601, 601 a, and also in 2 Greenl. Ev., sec. 221, and in 2 Kent's Com. *601, *602, and Redfield on Railways, c. 17."

In *Philadelphia etc. R. R. Co. v. Derby*, 14 How. 486, it is said by the court: "When carriers undertake to carry persons by the powerful but dangerous agency of steam, public policy and safety require that they should be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence in such cases may well deserve the epithet of gross."

This statement is approved in *Steamboat New World v. King*, 16 How. 474, as resting not only on public policy, but sound principles of law: See Redfield on Railways, sec. 149, note 5.

The above rule is sustained by *Stokes v. Saltonstall*, 13 Pet.

181; in Massachusetts, by *Ingalls v. Bills*, 9 Met. 1; 43 Am. Dec. 346; and *McElroy v. N. H. R. R. Co.*, 4 Cush. 400; 50 Am. Dec. 794; in Maine, by *Edwards v. Lord*, 49 Me. 279; in Connecticut, by *Hall v. Connecticut R. S. Co.*, 13 Conn. 320; *Derwent v. Loomer*, 21 Id. 258; *Fuller v. Naugatuck R. R. Co.*, 21 Id. 557, 576; in Vermont, by *Hadley v. Cross*, 34 Vt. 586; 80 Am. Dec. 699; see also *Hegeman v. Western R. R. Co.*, 16 Barb. 353; approved in 13 N. Y. 9; 64 Am. Dec. 517; *Caldwell v. Murphy*, 1 Duer, 241; *Camden etc. R. R. Co. v. Burke*, 13 Wend. 626; *Railroad Company v. Aspell*, 23 Pa. St. 147; *New Jersey R. R. Co. v. Kennard*, 21 Id. 203; *Galena etc. R. R. Co. v. Yarwood*, 15 Ill. 468; *Galena etc. R. R. Co. v. Fay*, 16 Id. 558; 43 Am. Dec. 323; *Frink v. Potter*, 17 Ill. 406; *Frink v. Coe*, 4 G. Greene, 555; 41 Am. Dec. 141; *Kenney v. Neil*, 1 McLean, 540; *Marcy v. Tallenge*, 2 Id. 157; *Comwall v. Sullivan R. R. Co.*, 28 N. H. 669; *Clark v. Barrington*, 41 Id. 51.

In *New Jersey R. R. Co. v. Kennard*, *supra*, Judge Gibson said "that the carrier is bound to guard the passenger from every danger which extreme vigilance can prevent." And it is said by Agnew, J., speaking for the court in *Meier v. Pennsylvania R. R. Co.*, 64 Pa. St. 225, 3 Am. Rep. 581, "that the above expresses the true measure of responsibility."

In *Laing v. Colder*, 8 Pa. St. 482, 49 Am. Dec. 533, Judge Bell said that though in legal contemplation the carrier does not warrant the absolute safety of his passengers, he is bound to the exercise of the utmost degree of diligence and care. The slightest neglect against which human prudence and foresight may guard, and by which hurt or loss is occasioned, will render them liable in damages.

One of the ablest of our text-writers and jurists, Judge Cooley, thus states the rule as to carriers of passengers: "Such carrier only undertakes that he will carry them without negligence or fault. But as there are committed to his charge for the time the lives and safety of persons of all ages and of all degrees of ability for self-protection, and as the slightest failure in watchfulness may be destructive of life or limb, it is reasonable to require of him the most perfect care of prudent and cautious men, and his undertaking as to his passengers goes to this extent, that as far as human foresight and care can reasonably go, he will transport them safely. He is not liable if injuries happen from sheer accident or misfortune, where there is no negligence or fault, or where no want of caution, foresight, or judgment would prevent the

injury. But he is liable for the smallest negligence in himself or his servants": Cooley on Torts, 2d ed., 768, 769. The learned author cites as sustaining his statements of the law a long list of cases, which will be found in note 1 to page 769.

As said by Bellows, J., in *Taylor v. Grand Trunk R. R. Co.*, 48 N. H. 813, 2 Am. Rep. 229, "Upon grounds of public policy, also, the carrier of passengers is bound to exercise the highest degree of care and diligence. To his diligence and fidelity are intrusted the lives and safety of large numbers of human beings,"—and when passengers are carried by steam, the demand for the utmost skill and diligence is especially required,—"for then in consequence of the greater speed, the hazards to life and limb are largely increased."

The same degree of responsibility must attach to one controlling and running an elevator. Persons who are lifted by elevators are subjected to great risks to life and limb. They are hoisted vertically, and are unable, in case of the breaking of the machinery, to help themselves. The person running such elevator must be held to undertake to raise such persons safely, as far as human care and foresight will go. The law holds him to the utmost care and diligence of very cautious persons, and responsible for the slightest neglect.

Such responsibility attaches to all persons engaged in employments where human beings submit their bodies to their control by which their lives or limbs are put at hazard, or where such employment is attended with danger to life or limb. The utmost care and diligence must be used by persons engaged in such employments to avoid injury to those they carry. The care and diligence required is proportioned to the danger to the persons carried. In proportion to the degree of danger to others must be the care and diligence to be exercised; where the danger is great, the utmost care and diligence must be employed. In such cases, the law requires extraordinary care and diligence.

We know of no employment where the law should demand a higher degree of care and diligence than in the case of the persons using and running elevators for lifting human beings from one level to another. The danger of those being raised is great. When persons are injured by the giving way of the machinery, the hurt is always serious, frequently fatal; and the law should, and does, bind persons so engaged to the highest degree of care practicable under the circumstances. It would be injustice and cruelty to the public in courts to abate

in any degree from this high degree of care. The aged, the helpless, and the infirm are daily using these elevators. The owners make profit by these elevators, or use them for the profit they bring to them. The cruelty from a careless use of such contrivances is likely to fall on the weakest of the community. All, including the strongest, are without the means of self-protection upon the breaking down of the machinery. The law, therefore, throws around such persons its protection, by requiring the highest care and diligence.

The carrier of passengers is under obligations to use the utmost care and diligence in providing safe, suitable, and sufficient vehicles for the conveyance of his passengers: *Readhead v. Midland R. R. Co.*, L. R. 2 Q. B. 412; L. R. 4 Q. B. 379; *Jamison v. S. J. & S. C. R. R. Co.*, 55 Cal. 593; *Ingalls v. Bille*, 9 Met. 1; 43 Am. Dec. 346; *Taylor v. Grand Trunk R. R. Co.*, 48 N. H. 304; 2 Am. Rep. 229; *Caldwell v. R. I. etc. Co.*, 47 N. Y. 287; *Grand Rapids etc. R. R. Co. v. Huntley*, 38 Mich. 537; 31 Am. Rep. 321; *Baltimore etc. R. R. Co. v. Miller*, 29 Md. 252; *Virginia Central R. R. Co. v. Sanger*, 15 Gratt. 230; *Kelly v. New York etc. R. R. Co.*, 109 N. Y. 44; *Herbert v. N. P. R. R. Co.*, 116 U. S. 651, 652.

Railroads must keep pace with science and art and modern improvement in their application to the carriage of passengers, but are not responsible for the unknown as well as the new: *Meier v. Pennsylvania R. R. Co.*, 64 Pa. St. 225; 3 Am. Rep. 581. In this case it is stated that the rule laid down in the second assignment of error is a correct summary of the law. The language used in the assignment of error referred to is this: "That the rule in regard to carriers of passengers is this: The utmost care and vigilance is required on the part of the carrier. This rule does not require the utmost degree of care which the human mind is capable of imagining; but it does require that the highest degree of practicable care and diligence should be adopted that is consistent with the mode of transportation adopted. Railway passenger carriers are bound to use all reasonable precautions against injury of passengers; and these precautions are to be measured by those in known use in the same business which have been proved by experience to be efficacious. The company are bound to use the best precautions in known practical use. That is the rule,—the best precautions in known practical use to secure the safety of the passengers, but not every possible preventive which the highest scientific skill might suggest."

Railroad companies are bound to adopt the most approved modes of construction and machinery in known use in the business. If they fail to do so, and injury result in consequence, they are responsible. As is said in *Ford v. London and Southwestern R. R. Co.*, 2 Fost. & F. 730, the company "was bound to use the best precautions in known practical use to secure the safety of their passengers, but not every possible preventive which the highest scientific skill might have suggested."

In *Steinweg v. Erie R. R. Co.*, 43 N. Y. 123, 3 Am. Rep. 673, it is held that railway companies, as common carriers, are bound to have such vehicles and machinery for the transportation of goods as the improvements known to practical men and tested by practical use may suggest, but not to take every possible precaution which the highest scientific skill might suggest, nor to adopt any mere speculative and untried experiment.

As stated above, it is said in *Ingalls v. Bills*, 9 Met. 1, 43 Am. Dec. 346, that the carrier of passengers is responsible for defects that might have been discovered upon the most careful and thorough examination.

In *Hadley v. Cross*, 34 Vt. 586, 80 Am. Dec. 699, the doctrine of *Ingalls v. Bills*, *supra*, was applied to a livery-stable keeper letting a defective carriage, and he was held liable if the defect could have been discovered upon the most careful and thorough examination.

It was held in *Hegeman v. Western R. R. Co.*, 16 Barb. 353, that the carrier is bound to conduct his business with all the care which human prudence and skill could suggest, and the defendants in that case were held liable for injuries caused by a defect in a car made by a competent manufacturer, which defect was not discoverable upon a thorough examination after the car was finished, but might have been before, by bending the axle in which the defect was. This decision was affirmed in 18 N. Y. 9; 64 Am. Dec. 517; see also *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 287.

In *Texas etc. R. R. Co. v. Hamilton*, 66 Tex. 95, the court said, in regard to a passenger carrier: "If any certain and satisfactory test is known which is within the reach of the company, it should be applied, and they should not in that case be excused if they rely upon a test which is clearly insufficient."

In relation to tests, it was said in *Hegeman v. Western R. R.*

Co., 13 N. Y. 26, 27, 64 Am. Dec. 517: "It is perfectly understood that latent defects may exist undiscoverable by the most vigilant examination when the fabric is completed, from which the most serious accidents have and may occur. It is also well known, as the evidence in this suit tended to prove and the jury have found, that a simple test (that of bending the iron after the axle was formed and before it was connected with the wheel) existed by which it could be detected. This should have been known and applied by men 'professing skill in that particular business.' It was not known, or if known was not applied, by these manufacturers. It was not used by the defendant, nor did they inquire whether it had been used by the builders. They relied upon an external examination, which they were bound to know would not, however faithfully prosecuted, guard their passengers against the danger arising from concealed defects in the iron of the axles or in the manufacture of them. For this omission of duty or want of skill, the learned judge held, and I think correctly, that they were liable."

Here it is held that the test referred to should have been known and applied by men "professing skill in that particular business" (viz., that of making axles and wheels for railway cars). The case related to a broken axle. The defendants were held liable if the test was not known to the manufacturers, or if known, was not applied by them.

In the light of the foregoing well-settled rules of law, that carriers of passengers are responsible, as far as human care and foresight will go, for the utmost care and diligence of very cautious persons, and therefore for the slightest neglect; that they are bound for defects in the vehicles which they furnish which might have been discovered by the most careful examination,—we think the court below did not err in modifying the instruction under consideration, as pointed out above.

It is a most reasonable precaution imposed on such a carrier, of whom we consider the owner of an elevator one, to require him to test the vehicles or machinery used by him by the best known tests reasonably practicable. If such tests are not used, the carrier is wanting in the care and foresight required.

Nor are the defendants excused from the degree of care and diligence above pointed out, by the fact that the elevator in use was constructed by a competent and skilled manufacturer, from whom they purchased it. The manufacturer was their

agent or servant in the construction of the elevator, and they are responsible for any want of care of the maker or builder. The obligation of care and foresight rests on the person using the elevator, and he cannot shift it from himself to another person.

This point is made and decided in *Hegeman v. Western R. R. Co.*, 16 Barb. 356, as also by the court of appeals of New York in the same case, where it was there heard.

In the case in 16 Barbour, the court, per Harris, J., said: "They [the defendants] gave evidence to show that they had purchased the car from a manufacturer of high reputation for the excellence and safety of the cars manufactured by him, and that, after employing all reasonable care and skill for the purpose of detecting any defect in the machinery, the defect in the axle, which was the cause of the accident, had remained undiscovered, and, in fact, could not be discovered by means of any examination which the defendants were able to make.

"The rule of law applicable to the evidence upon this branch of the case was very accurately stated by the learned judge at the circuit. After having distinctly laid down the general proposition that the defendants were not liable if they had exercised all reasonable care and diligence in providing a safe track and a safe engine and cars, and had properly supplied their train with a suitable number of competent and faithful men to take charge of the train, and those men had managed it in a careful and skillful manner, he proceeded to say, in respect to the defect in the axle, that the defendants were responsible for this defect to the same extent as if the axle had been manufactured by themselves. Of the soundness of this rule, I think there can be no doubt. From the very necessity of the case, the defendants are obliged to carry on their business through the instrumentality of agents. Some are employed to construct or keep in repair their roadway; others to construct or repair their engines and cars; and others, again, to operate such engines and cars upon the road. For neglect or want of skill in any of these, the defendants, as principals, are answerable to third persons. Whether the engine or car which they place upon the road for the purpose of carrying passengers has been manufactured in their own workshops by agents employed directly for that purpose, or by a manufacturer engaged in the business of supplying such articles for sale, they are alike bound to see that in the construction no care or skill has been omitted, for the purpose of

making such engine or car as safe as care and skill can make it. When such care and skill has been exercised, the defendant's duty in this respect has been discharged. If, on the other hand, a defect exists in the construction which might have been detected and remedied, they are answerable for the consequences."

The same point was thus disposed of in the opinion of the court in the same case in 13 N. Y. 26: "It was said that carriers of passengers are not insurers. This is true. That they were not required to become smelters of iron or manufacturers of cars in the prosecution of their business. This also almost must be conceded. What the law does require is, that they shall furnish a sufficient car to secure the safety of their passengers by the exercise of the 'utmost care and skill in its preparation.' They may construct it themselves, or avail themselves of the services of others; but in either case they engage that all that well-directed skill can do has been done for the accomplishment of this object. A good reputation upon the part of the builder is very well in itself, but ought not to be accepted by the public or the law as a substitute for a good vehicle. What is demanded, and what is undertaken by the corporation, is not merely that the manufacturer had the requisite capacity, but that it was skillfully exercised in the particular instance. If to this extent they are not responsible, there is no security for individuals or the public."

It was said of a coach proprietor, by Alderson, J., in *Sharp v. Gray*, 9 Bing. 457, that he is liable for all defects in his vehicle which can be seen at the time of construction, as well as for such as may exist afterward, and be discovered on investigation; if not, he might buy ill-constructed or unsafe vehicles, and his passengers be without remedy.

The above remarks apply with all their force to the proprietor of an elevator.

The reasonableness of the rule that the responsibility cannot be shifted to the manufacturer appears from the consideration that the law gives no remedy to the injured passenger against the manufacturer or builder of the elevator. There is no privity between the builder and the passenger.

The remarks of Hannen, J., in *Francis v. Cockrell*, L. R. 5 Q. B. 184, are especially appropriate here. In that case the plaintiff sued to recover for an injury occasioned by the fall of a grand-stand at a race-course. The defendant owned the stand, but had contracted with another to build it. It was

defectively constructed through the negligence of the contractor, and from the defect the fall occurred. The defendant was held liable. Hannen, J., said that the case was analogous to that of a carrier of passengers contracting with a builder to construct a car for him, where the builder was guilty of negligence in its construction. He said further: "In the ordinary course of things, the passenger does not know whether the carrier has himself manufactured the means of carriage or contracted with some one else for its manufacture. If the carrier has contracted with some one else, the passenger does not usually know who that person is, and in no case has he any share in the selection. The liability of the manufacturer must depend on the terms of the contract between him and the carrier, of which the passenger has no knowledge, and over which he can have no control, while the carrier can introduce what stipulations and take what sureties he may think proper. For injury resulting to the carrier himself by the manufacturer's want of care, the carrier has a remedy against the manufacturer; but the passenger has no remedy against the manufacturer for damage arising for a mere breach of contract with the carrier: *Longmeid v. Holliday*, 6 Ex. 761; 20 L. J. Ex. 430; see *George v. Skivington*, L. R. 5 Ex. 1. Unless, therefore, the presumed intention of the parties be that the passenger should, in the event of his being injured by the breach of the manufacturer's contract, of which he has no knowledge, be without remedy, the only way effect can be given to a different intention is by supposing that the carrier is to be responsible to the passenger, and to look for his indemnity to the person whom he selected, and whose breach of contract caused the mischief."

In *Francis v. Cockrell*, *supra*, the plaintiff was allowed to recover for the negligence of the contractor, a competent builder, though the defendant was not himself guilty of negligence, and was affirmed on this point in the exchequer chamber: L. R. 5 Q. B. 501. To the same effect are *Grote v. Chester and Holyhead R'y Co.*, 2 Ex. 251, and *Burns v. Cork and Bandon R'y Co.*, 13 L. R. C. L. 543.

4. It is further argued that the court erred in giving the first instruction asked by plaintiff. The instruction is as follows: "That the defendant owed it as a duty to the persons using the elevator in their store, either as customers or by their invitation or request, to use all reasonable means and efforts to furnish good and well-constructed machinery adapted to the purposes of its use, of good material, and of

the kind which is found to be safest when applied to use; and while they were not required to seek and apply every new invention, they must adopt such as are found by experience to combine the greatest safety with practical use."

We think this is a direction that the defendants were bound to use all reasonable means and efforts to furnish good and well-constructed machinery, adapted to the purpose of its use, and all reasonable means and efforts to furnish or provide it, of good material, and of the kind that is found to be the safest when applied to use; that the kind of machinery furnished and the material furnished must be of that kind which has been found by others using it or constructing such machinery to be safest in practical use. The latter portion of the instruction bears out this interpretation; it is, that the defendants must adopt such inventions as are found by the experience of other persons to combine the greatest safety with practical use; yet while they are bound to do this, the law excuses them from seeking and applying every new invention. The instruction, as we understand it, is but a fair deduction from the rule that the defendants must use the utmost care and diligence to carry safely those who ride in their elevator, as far as human care and foresight will go, and while they do not engage for absolute safety, they do bind themselves and warrant that they will use the utmost care and diligence of very cautious persons, as far as human care and foresight will go, to provide such means of carriage as are above pointed out.

Like common carriers of passengers, they must keep pace with science, art, and modern improvement in supplying safe obtainable vehicles, machinery, and appliances for their use: See 2 Redfield on Railways, 241, 242. They must adopt the most improved modes of construction and machinery in known use in the business, and if they do not, and injury occur, they will be held responsible: *Id.* As was said in *Hegeman v. Western R. R. Co.*, 16 Barb. 348: "The defendants were bound to use every precaution which human skill and foresight could suggest to insure the safety of passengers." A like obligation rested on the defendants in this case: See, on this point, *Smith v. New York etc. R. R. Co.*, 19 N. Y. 127; 75 Am. Dec. 305; *Steinweg v. Erie R. R. Co.*, 48 N. Y. 127; 3 Am. Rep. 673; *Bevere v. Delaware etc. Co.*, 13 Hun, 258; *Meier v. Pennsylvania R. R. Co.*, 64 Pa. St. 225, 227, 231; 3 Am. Rep. 581.

We find no error in the giving of this instruction by the court below.

5. It is urged that the court below erred in allowing the witnesses Bangs and Ravekes to testify as to the instructions given the defendants and their employees with respect to running the elevator.

Bangs appears to have been a skilled mechanic, who had been engaged in putting up elevators. He had repaired the elevator of defendants several times. On one occasion when he was repairing this elevator he cautioned one of the defendants as to the mode in which they ran it. He told this defendant, when he was there repairing the elevator, about their using it very carelessly; that they ought to be more cautious; that the pressure should be shut off at a particular point.

Ravekes was one of the defendants, and he testified "that Bangs generally instructed us that we should always ease the *rater* off as it was getting to the place to be stopped, and not *let it run* without that; that Bangs further told him what the effects would be of neglecting this."

The questions which brought out this testimony and the answers to the questions were objected to.

It would be strange to hold that this evidence was not admissible.

The defendants were bound to acquaint themselves with the best mode of running this elevator, so as to carry safely those who rode on it. They should have sought information diligently on this point. Making use of a contrivance for raising human beings vertically, if they failed to acquaint themselves with the safest mode of running it, would be of itself the grossest negligence. Any caution which they received should have been most acceptable to them. Here they were cautioned by a skilled man that they were running the elevator carelessly.

The evidence was competent and material to show a knowledge by defendants that they were operating the elevator incautiously and carelessly. We cannot conceive that the *scienter* can be proved in any other mode than by information from others. Conceding that the evidence of Bangs was hearsay, it was of that character of hearsay which is admissible for the purpose for which it was allowed. Certainly the evidence of Ravekes, one of the defendants, was not hearsay. He testified to information conveyed to him material on the main issue in the case, viz., of negligence. What was said by Bangs to Ravekes was said in reply to inquiries by the latter, and the information was communicated by Ravekes to everybody

else in the store. On the point of admissibility, see 1 Greenl. Ev., sec. 101; 1 Wharton on Evidence, sec. 252.

The above disposes of all the points discussed on the oral argument, and all, we presume, relied on to secure a new trial. We have nevertheless looked into all the other points discussed in the opening brief of appellants, and, after consideration, find no error in the rulings of the court below.

The judgment and order must be affirmed, and it is so ordered.

McFARLAND, J. (concurring). I concur in the judgment of affirmance.

1. I concur in all that is said in the first point discussed in the opinion of Mr. Justice Thornton.

2. I think, also, that the court below did not err in striking the words "and to a moral certainty" out of the instruction asked by defendants. The words "moral certainty," as found in section 1826 of the Code of Civil Procedure, are certainly somewhat confusing, considering their celebrated use by Chief Justice Shaw in the Webster case as part of the definition of belief beyond "a reasonable doubt." It is evident, however, that the words were not used in the latter sense in the section referred to, else the well-recognized distinction between the amount of evidence required for conviction in a criminal case and the amount sufficient to determine an issue in a civil action would be entirely obliterated. The legislature must be held as stating, or trying to state, in section 1826, the general difference between a mathematical, or strictly scientific, demonstration, and the kind of proof usually obtainable in judicial trials. They did not intend to use the words in that relation as synonymous with proof beyond a reasonable doubt. And this is apparent from section 2061, which provides that the court, on proper occasions, must instruct the jury, among other things, "that in civil cases the affirmative of the issue must be proved, and when the evidence is contradictory, the decision must be made according to the preponderance of evidence; that in criminal cases guilt must be established beyond reasonable doubt." It was sufficient, therefore, in the case at bar, for the court to tell the jury that plaintiff must prove his case "by a preponderance of evidence." To have added "and to a moral certainty" would have tended to confuse and mislead the jury.

But I do not entirely agree with the other reasons which Mr. Justice Thornton gives for sustaining the action of the

court on this instruction. I think he states the doctrine too broadly that the mere happening of an accident, of itself, proves the negligence of the carrier. Of course, in many instances, the nature of the accident, and the circumstances under which it occurred, will, if unexplained, make a *prima facie* case of negligence; but I do not take it to be established as a rule of law that any accident by which a passenger is injured will have that effect. In *Boyce v. California Stage Co.*, 25 Cal. 468-470, there are some expressions (in the opinion of the court) which tend toward such an extreme doctrine; but they were not necessary to the decision of the case. In that case, the circumstances showed extreme carelessness on the part of the driver of the coach. The court say: "At the point where the overturning occurred, the road formed the arc of a circle. Instead of moving on the arc, the team took the chord, and went so near the precipice as to allow the wheels to run over. . . . One cannot read the evidence in connection with the diagram contained in the record without coming to the conclusion that the overturning which caused nearly fatal injuries to the plaintiff, and death to some of the other passengers, was the result of careless inattention on the part of the coachman in not keeping his team in the road. . . . It is most probable, from the evidence, that his inattention was the result of drowsiness, induced by the hour and the use of too much liquor." But if, in such a case, the plaintiff should merely show that while a coach was going at a moderate gait along the middle of a good, wide, and commonly traveled road, it was suddenly overturned, without any apparent cause, would those facts alone make out a case of negligence (which is always the gist of such an action) against the defendant?

3. I concur in the doctrine that the responsibility of a common carrier of passengers attaches to one who controls and runs an elevator used as appellants used the elevator by which respondent was injured.

I also concur in the conclusion that the court below did not err in giving the first instruction asked by plaintiff, or in adding to the ninth instruction asked by defendants the words, "according to the best known tests reasonably practicable"; but I think that some of the cases cited by Mr. Justice Thornton, with apparent approval, in his discussion of those instructions, carry the rule concerning the application of tests beyond its legitimate reach.

On all other points, I concur in the opinion of Mr. Justice Thornton.

Rehearing denied.

ELEVATORS. — It is believed that the principal case is the only one which fully considers and determines the degree of care exacted of persons in whose places of business passenger-elevators are operated.

DAMAGES—SPECIAL AND GENERAL—PLEADING. — Damages not necessarily accruing from the act complained of are special, and must be pleaded with particularity: *Brackett v. Edgerton*, 14 Minn. 174; 100 Am. Dec. 211; *Stevenson v. Smith*, 28 Cal. 102; 87 Am. Dec. 107; *Heirn v. McCaughan*, 22 Miss. 17; 66 Am. Dec. 588, and note; note to *Adams Ex. Co. v. Egbert*, 78 Id. 387; *Laing v. Colder*, 8 Pa. St. 479; 49 Am. Dec. 533; *Donnell v. Jones*, 17 Ala. 785; 48 Am. Dec. 59; *Cole v. Swanston*, 1 Cal. 51; 52 Am. Dec. 238. One must aver special damage in order to recover any money expended by him or debt created on account of a personal injury for which he seeks to recover damages: *South Covington etc. R'y Co. v. Ware*, 84 Ky. 267; compare *Butler v. Kent*, 19 Johns. 223; 10 Am. Dec. 219; *Dickinson v. Boyle*, 17 Pick. 78; 28 Am. Dec. 231.

NEGLIGENCE.—BURDEN OF PROOF in actions for injuries caused by negligence: See *Blanchard v. Lake Shore etc. R'y Co.*, 125 Ill. 416; 9 Am. St. Rep. 630, and particularly cases cited in note 637, 638.

CARRIERS OF PASSENGERS. — What care required: See *Louisville etc. R'y Co. v. Snyder*, 117 Ind. 435; 10 Am. St. Rep. 60, and note 64.

ALBERTOLI v. BRANHAM.

[80 CALIFORNIA, 681.]

IN PLEADING FRAUD, IT IS NOT SUFFICIENT TO ALLEGE IN GENERAL TERMS, but the facts constituting the fraud must be stated.

ANSWER ASSERTING THAT TRANSFER WAS FRAUDULENT. — In an answer seeking to justify the levy of a writ upon property which had been transferred by the defendant in execution, an averment that such transfer was made for the purpose of hindering, delaying, and defrauding the creditors of the grantor is not sufficient. It must go further, and show that he had no other property subject to execution out of which his debts could be satisfied. This is because the transfer is good between the parties, and will not be set aside unless necessary for the protection of creditors.

A FINDING OUTSIDE OF THE ISSUES MUST BE DIARGUED.

KNOWLEDGE ON THE PART OF A GRANTEE THAT A TRANSFER WAS INTENDED TO DEFRAUD CREDITORS OF THE GRANTOR is necessary to avoid such conveyance, if it was made on full consideration; knowledge that the grantor was insolvent is not sufficient.

Hiram D. Tuttle and John Reynolds, for the appellant.

T. H. Laine, for the respondent.

WORKS, J. The only question presented by the appeal is, whether the answer of the defendant and the findings of the court show that the conveyance of the property in controversy to the plaintiff was fraudulent as against the creditors of his grantor. The answer alleges: "Defendant further alleges, upon and according to his information and belief, that heretofore, to wit, on the fourth day of July, 1885, Serefino Albertini, hereinbefore mentioned, was the owner and in possession of all the property sued for in this action, described in the complaint herein; and that he was then justly indebted to divers persons in large sums of money, and, among them, to Attilio Agustini, to whom he was indebted in the sum of \$387.85, and to whom he is now justly indebted in a large amount, to wit, in the sum of \$955.94, the judgment hereinbefore mentioned and referred to; that the plaintiff herein and the said Serefino Albertini, with a full knowledge of said indebtedness of said Albertini to said Attilio Agustini and others, thereafter, and on or about the eighteenth day of July, 1885, for the purpose of hindering, delaying, and defrauding the said Attilio Agustini and the other creditors of said Serefino Albertini in the collection and recovery of their just debts and claims against the said Albertini, made a pretended sale and transfer of the whole of said personal property (seized as aforesaid) from said Albertini to the plaintiff herein; that at the time of said transfer said plaintiff knew that said Albertini was insolvent; and defendant avers that said transfer was made with the intent on the part of plaintiff and said Albertini to hinder, delay, and defraud the said creditors of said Albertini, including said Attilio Agustini; and he further avers that said Serefino Albertini, at the time of said pretended sale and transfer to the plaintiff herein, had the possession and control of all of said personal property seized by defendant as aforesaid; and he avers that said sale and transfer was not accompanied by an immediate delivery of said property, nor followed by an actual or continued change of possession thereof."

The court found on this issue as follows: "That on said eighteenth day of July, 1885, said Serefino Albertini made a sale to the plaintiff of his said leasehold interest, and of his right and title to all said property sued for in this action, except said ninety-six cheeses herein, and then and there delivered said property so sold to the plaintiff herein, all of which was situated on said leased lands; that said sale was made with the intent to hinder, delay, and defraud the creditors of

said Albertini on the part of both of said parties thereto, and especially to hinder, delay, and defraud the said Attilio Aguatini and those who assigned their demands to him, as hereinbefore stated; that said sale involved and comprehended all the property of said Albertini, and left him without any visible property."

It is contended by the appellant that the answer stated nothing more than the conclusion that the conveyance was made to hinder and defraud creditors, and not the facts constituting such fraud. It is well settled that in pleading fraud it is not sufficient to allege it in general terms, and that the facts constituting the fraud must be stated: *Pehrson v. Hewitt*, 79 Cal. 594; *City of Oakland v. Carpentier*, 21 Id. 642; *Castle v. Bader*, 23 Id. 76. The only fact alleged in the answer sufficient to avoid the transfer was, that the sale "was not accompanied by an immediate delivery of said property, nor followed by an actual or continued change of possession thereof," and the findings do not support this allegation. Where a creditor attacks a transfer of property made by his debtor on the ground that such transfer was made to defraud, hinder, or delay creditors, facts must be alleged showing that the conveyance was made in such manner and under such circumstances as to have that effect. Therefore, it must appear that at the time the conveyance was made the debtor had not other property subject to execution out of which his debts could be satisfied: *Evans v. Hamilton*, 56 Ind. 34; *Deutsch v. Korsmeier*, 59 Id. 373; *Pfeifer v. Snyder*, 72 Id. 78. This allegation is necessary to show that the conveyance was in fact fraudulent as against the creditors. If the debtor has other property subject to execution sufficient to satisfy his indebtedness, the conveyance cannot amount to a fraud on his creditors. And where the attempt is made to set aside a conveyance on such grounds, it must appear from the complaint that at the time the action is commenced the debtor has not other property sufficient to satisfy his debts: *Brucker v. Kelsey*, 72 Id. 51; *Sherman v. Hogland*, 73 Id. 472. This is for the reason that the conveyance, although made for the purpose of defrauding creditors, is valid as between the parties, and cannot be set aside, unless it appears to be necessary for the protection of the creditor, and no such necessity exists if at the time he commences his action there is other property of the debtor out of which his debt can be made. In this case it should have been alleged, for a like reason, that at the time of

the levy of the execution under which the defendant attempted to justify his possession of the property, there was not other property of the debtor subject to such execution sufficient to satisfy the debt for which the levy was made. In the answer before us no such allegations are to be found. The court found that the transfer left the debtor without visible property, but this was a finding outside of the issues. There is no direct allegation that at the time the conveyance was made, or at any time subsequent thereto, the debtor did not have other property sufficient to satisfy his debts, nor is it alleged that the conveyance was without consideration. If full consideration was paid for the property, the creditors were not defrauded, and unless the grantee of the property had notice of the intended fraud of the debtor, he would be protected, having paid a valuable consideration. The only allegation of fact tending to show knowledge on the part of the plaintiff that the conveyance was for the purpose of defrauding creditors was, that he knew at the time that his grantor was insolvent. This was not sufficient, as there is no reason why an insolvent debtor may not convey his property for full value, which may have been the case here. It was not sufficient to characterize the conveyance as pretended and fraudulent (*Pehrson v. Hewitt*, 79 Cal. 594), and this was all that was done, except for the allegation of non-delivery, which, as we have said, was found against the defendant. We have in this case, as in many others, found it difficult to separate the different counts of the pleadings, and desire to suggest to attorneys that if the several counts of the pleadings were consecutively numbered in all cases, the practice would be much improved. The judgment and order are reversed, and cause remanded for a new trial, with instructions to the court below to allow the parties to amend their pleadings.

FRAUD, HOW SHOULD BE PLEADED: See *Williams v. McFadden*, 23 Fla. 143; 11 Am. St. Rep. 345, and cases collected in note 351.

FRAUDULENT CONVEYANCES. — Conveyance made with intent to defraud the creditors of the grantor, the grantee having knowledge of and participating in the fraud, is ordinarily good between the parties thereto, their heirs, executors, etc.; but under some circumstances, the grantor or those representing him will be permitted to repent of his fraud, and secure a rescission of the conveyance for the benefit of the defrauded creditors: *Carl v. Emery*, 148 Mass. 22; 12 Am. St. Rep. 515, and note 517.

CASES
IN THE
SUPREME COURT
OF
COLORADO.

**GREAT WEST MINING COMPANY v. WOODMAN OF
ALSTON MINING COMPANY.**

[12 COLORADO, 48.]

SERVICE OF SUMMONS, TO BIND A CORPORATION DEFENDANT, must be upon its general agent.

A GENERAL AGENCY EXISTS WHERE there is a delegation to do all acts connected with a particular trade, business, or employment. A special agency exists where there is a delegation to do a single act.

SERVICE OF SUMMONS UPON THE FOREMAN OF A CORPORATION IS INVALID where there is a general agent by whom such foreman was employed, and where the duties of the foreman were to oversee the laborers in a mine, keep their time, see that their work was done in mining fashion, and perform the duties of mine-boss, and, in the absence of the general agent, to sell ores, buy supplies, pay wages, and report his acts and doings to the general agent.

TO BIND A CORPORATION, THE SERVICE OF PROCESS must be upon the identical agent provided by a statute.

APPEARANCE BY UNAUTHORIZED ATTORNEY BINDS NO ONE; and the presumption that the attorney who appeared was authorized to do so may be rebutted in any direct proceeding to attack the judgment based upon such appearance, by showing that no process was served in the action, and that the attorney appeared without the consent or knowledge of the one whom he assumed to represent.

JUDICIAL SALES. — ALL SALES OR OTHER PROCEEDINGS BASED UPON A JUDGMENT SECURED THROUGH THE UNAUTHORIZED APPEARANCE OF AN ATTORNEY are as to all persons, irrespective of notice or *bona fides*, absolute nullities.

VOID JUDGMENT, EFFECT OF. — ABSENCE OF LEGAL SERVICE OR AUTHORIZED APPEARANCE IS JURISDICTIONAL, and without jurisdiction no judgment can be entered under which any rights can be lost or acquired.

JURISDICTION CANNOT BE ACQUIRED BY THE MERE LEVY OF AN ATTACHMENT, sufficient to authorize the court to determine the question of indebtedness, and to condemn the attached property to pay the same. Though an attachment is levied, jurisdiction is not acquired until service of summons.

DUE PROCESS OF LAW. — No person can be prejudiced, or his rights of person or property affected, without notice, actual or constructive. Any proceeding which violates this principle is not due process of law, and is not according to the law of the land.

LACHES OR DELAY ALONE WILL NOT PRECLUDE THE ASSERTION OF AN EQUITABLE RIGHT, WHEN THE NEGLIGENCE TO MORE PROMPTLY ASSERT such right has not lulled the adverse party into doing that which he would not have done, or into omitting to do that which he would have done, in reference to the property, had the right been more promptly asserted.

LACHES. — IF REAL PROPERTY IS SOLD UNDER A JUDGMENT ENTERED IN AN ACTION IN WHICH THERE WAS NO SERVICE OF PROCESS upon the defendant, nor any authorized appearance by an attorney on his behalf, and if the defendant had no notice of such judgment, nor of the sale of such property until the time for redemption had expired, and if the defendant, as soon as he obtained information of the fraud perpetrated upon him, was diligent in employing counsel and commencing suit, he is not barred by laches from maintaining an action for relief from such judgment, and to recover such property, although such action was not brought until three years after the perpetration of the fraud complained of, and eighteen months from the time of the execution of the sheriff's deed.

JUDICIAL SALE. — RELIEF WILL BE GRANTED FROM A SALE BASED UPON A JUDGMENT entered without service of process upon or appearance on behalf of the defendant, without inquiring as to the merits of the original claim. Although a just cause of action exists against the defendant, he must be allowed an opportunity to pay the debt, or redeem the property from sale, before his title thereto can be divested by judicial proceedings.

JUDICIAL SALES. — THOUGH REAL ESTATE SOLD UNDER A JUDGMENT HAS PASSED TO THIRD PARTIES, this will not defeat the right of the plaintiff to avoid such sales by showing want of jurisdiction in the court entering such judgment.

SHERIFF'S RETURN, IMPEACHING. — An officer's return may be impeached when the matters stated therein are not presumptively within his personal knowledge. Hence, where the return of service of process shows that it was served upon P., "the agent of the defendant company," "the resident agent of defendant company," the matters thus stated with respect to P.'s agency are not presumptively within the knowledge of the officer, and the return may be impeached by proving that P. was not the general agent of the defendant.

PRACTICE. — DEFECT OR MISJOINDER OF PARTIES appearing upon the face of the complaint is a ground of demurrer, and when not appearing on the face of the complaint, objection thereto may be taken by answer. If no such objection be taken, either by answer or demurrer, it is waived. Therefore the question of defect of parties defendant cannot be raised for the first time in the appellate court, when it appears that the persons who ought to have been made defendant are not indispensable parties, and that a decree can be entered between the parties to the action without them.

Hugh Butler, for the appellees.

L. S. Dixon, H. B. Johnson, and D. E. Parks, for the appellant.

GERRY, J. The original complaint is not set out in the record, nor is reference made to the same in the abstract or argument of counsel. The amended complaint is a suit against the Woodmas of Alston Mining Company, and Alfred H. and Randall W. Wilson. It was begun in the district court of Park County, but, by consent of parties, heard before the district court of said district in El Paso County. It is shown by the pleadings and proofs that the plaintiff is a domestic corporation, organized under the laws of this state, and that in January, 1888, it was the owner of certain mining claims situate in the county of Park; that, while it was such owner, one Perkins instituted a suit against it by attachment, and about the same time a second suit was instituted against it by one Moynahan, both for the recovery of claims due from the said plaintiff to Perkins and Moynahan. Perkins was the assignee for a number of persons who were the creditors of the appellant, they assigning their claims to him for convenience, and to enable him to bring one suit for the recovery of the aggregate of all the claims. One C. S. Purmort, whom it is claimed by appellees was the general agent of the company, was one of the persons who assigned his claim to the said Perkins. The other suit was by Moynahan on his own account. Both suits were begun by attachments, and jurisdiction, so far as the property of the company was concerned, was acquired by the issue and levy of the proper writs of attachment. The writs were served upon the said Purmort, who was at that time acting as foreman on the mines owned by the appellant. The general agent of the company at that time was one A. W. Kellogg, and Purmort received his appointment as foreman from Kellogg. When the sheriff served these writs on the said Purmort, he then stated that he was not the agent of the company, but simply its foreman, and in each case the sheriff made return that he had executed the writs by serving the same upon Purmort, the foreman of the defendant company. Afterwards, upon leave of court obtained for this purpose, the said sheriff amended his return, showing that he had served the process upon Purmort as the agent of the defendant company.

The amended return on the writ of attachment in the Perkins suit showed that the return was upon said Purmort as

"the resident agent of the company," and in the other writs and summons the amended return showed that the service was had upon the same person as "the general agent of the company." In the suit of Perkins there was no appearance of the defendant, and judgment was entered by default. In the Moynahan suit, one Gwynn assumed to appear as attorney for the defendant company, and entered the appearance of said company. A sort of trial was had, and judgment rendered in favor of Moynahan for the amount sued for in the complaint. Subsequently, special executions were issued, and the property was levied upon and sold for a sum of money sufficient to pay both judgments and costs. At such sale, Gwynn, representing Perkins and Moynahan, and acting for himself, became the purchaser, receiving certificates of purchase. Nine months afterwards, the appellant having failed to redeem, sheriff's deeds were issued to Gwynn and Moynahan. The property was sold by the sheriff some time in 1883, and the nine months allowed for redemption expired early in 1884. After receiving the sheriff's deeds, Gwynn and Moynahan entered into possession of the property as owners, and continued in possession until the month of December, 1884, at which time they sold and conveyed the property to appellees, Alfred H. and Randall W. Wilson. During the year 1885 the Woodmas of Alston company was formed by the appellees, and a conveyance was made by the Wilsons to the said company. The mining property described in the complaint, and the subject-matter of this suit, has been worked by the appellees, and a large amount of ore extracted therefrom, and they have derived in profits an amount largely in excess of the amount of the judgments in question.

It is not necessary to analyze the pleadings in this case, or review, to any considerable extent, the evidence. It is clearly apparent that the only service of summons had was upon the said Purmort; that he was not the general agent,—he was simply the foreman, and acting in behalf of the general agent, Kellogg; that the plaintiff in the attachment suits, and the sheriff who made the service, knew that he was simply foreman, and the sheriff in the first instance so returned; that the said Purmort concealed or neglected to inform the company of the fact of such service, and that the said Gwynn, when he entered the appearance of the defendant company in the Moynahan suit, had no authority whatever for this purpose; and that he neglected or refused to inform the company of the fact

of such suit, and that the company had no actual notice that any suit had been begun, that there had been any sales made under execution, or that there had ever been a conveyance of the property by the sheriff.

There was an attempt to obtain jurisdiction by service of process upon an agent of the corporation. In cases of domestic corporations, the service must be upon a general agent: Code Civ. Proc. 1883, sec. 40. There is a wide distinction between a general and a special or particular agent,—a distinction not unfounded or useless, and one which solves many cases. A special agency exists where there is a delegation of authority to do a single act, and a general agency exists where there is a delegation to do all acts connected with a particular trade, business, or employment: Story on Agency, sec. 17. Numerous other authorities recognize this same distinction so clearly laid down by Mr. Story: *Beals v. Allen*, 18 Johns. 363; 9 Am. Dec. 221; *Martin v. Farnsworth*, 49 N. Y. 555; *Merserau v. Phoenix etc. Ins. Co.*, 66 Id. 274; *Atlantic etc. R. R. Co. v. Reisner*, 18 Kan. 458; *Cruzan v. Smith*, 41 Ind. 288. While the powers of a general agent may be liberally construed according to the necessities of the occasion and the scope of his business and employment, those of a special agent are limited by the terms in which they are conferred, and he takes nothing by implication. C. S. Purmort, the person upon whom service of process was had in this case, could in no sense of the term be called a general agent. As shown by the evidence, one A. W. Kellogg was the general agent. Purmort was employed by him as foreman of the mine. His duties were to oversee the laborers on the mine, keep their time, see that work was done in mine fashion, perform the duties of shift-boss, and in the absence of the general agent, Kellogg, he sold ore and bought supplies for the men, and paid their wages, reporting his acts and doings to Kellogg. He made no reports, and had no communications with the company direct. He kept no books, and had no office, nor was he held out by the company as an agent, nor did he represent himself as such. On the contrary, when the sheriff served the writ and summons upon him, he notified the sheriff that he was not an agent of the company, but simply foreman, and the sheriff at that time so understood, and made return of process accordingly. His duties and powers were limited, and not connected in any manner with the general management and supervision of the affairs of the company.

To bind a corporation, the service of process must be upon the identical agent provided by the statute: *Chambers v. Bridge Manufactory*, 16 Kan. 270; *Kennedy v. Hibernia etc. Soc.*, 38 Cal. 151; *Watertown v. Robinson*, 59 Wis. 513; *Aiken v. Quartz etc. Mining Co.*, 6 Cal. 187; *O'Brien v. Shaw*, 10 Id. 343; *Reddington v. Mariposa etc. Mining Co.*, 19 Hun, 405; *Cherry v. North etc. R. R. Co.*, 59 Ga. 446; *Union Pac. R. R. Co. v. Miller*, 87 Ill. 45.

In *Lake Shore R'y Co. v. Hunt*, 39 Mich. 469, the court, in speaking of the return of service upon an agent, said: "But what sort of an agent? Was he agent to buy wood, or to employ a switchman, or to keep cattle off the track, or what was his agency? Every servant of the road is in a sense an agent. There must be something more definite than the mere designation of a man as 'agent' before a court can say that his relation to the corporation was such as to make him its representative for the purpose of receiving services of process for it. The terms 'general or special agent' are very indefinite, but employed as they are here, in association with terms designating the principal officers of the corporation, they evidently intend agents who either generally or in respect to some particular department of the corporate business have a controlling authority, either general or special. They do not mean every man who is intrusted with a commission or an employment."

In *Reddington v. Mariposa etc. Mining Co.*, *supra*, the court said: "It is quite clear that the legislature attached importance to the term 'managing agent,' and employed it to distinguish a person who should be invested with general power, involving the exercise of judgment and discretion, from an ordinary agent or employee who acted in an inferior capacity, and under the direction and control of superior authority, both in regard to the extent of the work, and the manner of executing the same. The distinction thus attempted to be drawn we deem reasonable, and in harmony with the obvious purpose of the statute in regard to the service of process upon a foreign corporation."

In *Upper Mississippi Transp. Co. v. Whittaker*, 16 Wis. 233, the question presented was, whether there had been a sufficient service. The summons had been served upon the captain of a steamboat belonging to the company while employed in transacting its business on the Mississippi River, within the boundaries of the state, and the court held that he was not

a managing agent, within the meaning of the statute. Said the court: "The statute relates to an agent having a general supervision over the affairs of the corporation."

The service of process in this case was not made upon a general agent of the defendant company, and such service could not bind the company. This conclusion renders necessary the investigation of the question whether the appearance of the appellant company entered by the attorney Gwynn in the Moynahan suit would bind it. He was not employed for this purpose by the company direct, or through its authorized agents, nor did he inform the company of his acts in the premises. His appearance was wholly unauthorized, and, in a proceeding directly attacking the judgment, this can be shown. The record shows that the defendant company appeared by its attorney, and this is conclusive proof that the attorney so appeared, but only *prima facie* evidence of the authority of the attorney so to act. It would not only be harsh, but absurd, to hold that a person could be deprived of his property without notice, and upon the mere entry of an appearance by an attorney acting wholly without authority delegated for this purpose. Attorneys are officers of the court, and their authority to appear in any particular case will not be questioned by the court. Their appearance is *prima facie* evidence of authority to act; but when such authority is denied or properly put in issue, it is competent to rebut by proofs any presumptions which may arise from such acts. If the attorney was without authority, then his acts could bind no one: *Shelton v. Tiffin*, 6 How. 163; *Shumway v. Stillman*, 6 Wend. 447; *Welch v. Sykes*, 3 Gilm. 197; 44 Am. Dec. 685; *Hall v. Williams*, 6 Pick. 232; 17 Am. Dec. 356; *Sheriff v. Smith*, 47 How. Pr. 470; *Thompson v. Emmert*, 15 Ill. 415; *Chapman v. Austin*, 44 Tex. 133; *Napton v. Leaton*, 71 Mo. 358.

The proceedings in this case are a direct attack upon the judgment, and it is useless to discuss the question so ably presented by counsel, whether a judgment can be attacked collaterally for want of due service. It was competent to show that the service of the writ and summons was not made upon a general agent of the defendant, and that the entry of appearance by the attorney was unauthorized, and that no notice was given to the parties whose right was sought to be affected by such entry. It follows as a logical result of the propositions before discussed that a judgment rendered without ser-

vice, or upon the unauthorized appearance of an attorney, is (whenever it is made to appear by proper proceedings instituted for this purpose) void, and that all sales, or other proceedings had thereunder, are as to all persons, irrespective of notice or *bona fides*, absolute nullities: *Shelton v. Tiffin*, 6 How. 163. A different rule might prevail if a judgment is only attacked on the ground of fraud, and rights had been acquired on execution sales without notice of such fraud. But absence of legal service or authorized appearance is jurisdictional. Without jurisdiction no judgment whatever will be entered, nor rights acquired thereunder.

The mere levy of an attachment did not give the court jurisdiction to determine the question of indebtedness, and condemn the attached property to pay the same. The remedy by attachment is purely statutory. It has no existence without the statute. It has an individuality entirely foreign to the common law, and being in derogation of common right, must be strictly construed. An attachment of real estate and notice thereof is made by filing a copy of the writ, together with a description of the property, with the recorder of the county, and by serving a copy of the writ on the defendant: Civ. Code 1883, sec. 101. When service is other than personal, or personal service without the state, the statute provides when this shall be complete: *Id.*, secs. 44, 45. The statute (*Id.*, sec. 49) further provides that, from the time of the service of summons in a civil action, the court shall be deemed to have acquired jurisdiction, and to have control of all subsequent proceedings. A voluntary appearance of the defendant shall be equivalent to personal service upon him. Where a defendant resides in this state, and there is no question but that he can be personally served, the service is complete when a copy of the writ is served upon him, and the property levied upon. Then, and not until then, does the court acquire jurisdiction to finally hear and determine the same. This is a construction that this provision of the code has ever received: *Kendall v. Washburn*, 14 How. Pr. 380; *Moore v. Thayer*, 6 *Id.* 47; *In re Griswold*, 13 Barb. 412; *Kelly v. Countryman*, 15 Hun, 97.

This provision of the statute is simply a declaration of that principle always maintained by the courts, that a person cannot be prejudiced or his rights of person or property affected without notice, either actual or constructive. So jealous have the people been of the maintenance of this principle that it

has been ingrafted into both the federal and the state constitutions, and that constitutional requirement of due process of law extends to all proceedings, judicial and administrative: *Stuart v. Palmer*, 74 N. Y. 183; 30 Am. Rep. 289; *Clark v. Mitchell*, 79 Mo. 627. The courts have uniformly held that this requirement demands that there shall be notice and hearing before condemnation. Any proceeding which violates these principles is not "due process of law," and is not according "to the law of the land." Where the property of a citizen is taken and condemned without notice to him, it is entirely immaterial whether it be a special or general judgment; the fundamental wrong in such case being that his property is taken and conveyed to some other person without his knowledge.

The abstract in this case was very imperfect, and the record exceedingly voluminous, and the court regrets that no argument was filed by counsel for the appellees; for in cases of this magnitude the court is entitled to all the light which the experience and research of counsel can furnish.

Judgment reversed and cause remanded.

ON REHEARING.

HART, J. In the opinion of this court in this case filed upon the thirtieth day of November, 1888, Mr. Justice Gerry concludes by saying: "The abstract in this case is very imperfect, and the record exceedingly voluminous, and the court regrets that no argument was filed by counsel for the appellees; for in cases of this magnitude the court is entitled to all the light which the experience and research of counsel can furnish." After that opinion was filed, and the case reversed, counsel for appellees came before the court, excusing his failure to file an argument, and asking that a rehearing be granted; and, the appellant having filed a motion asking that this court enter a final decree herein, by consent of counsel the rehearing was granted. Briefs were filed, and an oral argument heard, and the entire matter submitted anew to the consideration of the court.

In the former opinion it was held, — 1. That service of process in this case was not made upon a general agent of the defendant company, and that the service made did not bind the company; 2. That the appearance of Gwynn for defendant was wholly unauthorized, and the company was not bound thereby; 3. That the mere levy of the attachment did not give the court

jurisdiction to determine the question of indebtedness, and condemn the attached property to the payment of the same.

After again carefully considering these questions, we see no reason to change the views heretofore expressed. Purmort, upon whom service was made for the company, was directly interested in the success of the plaintiff's action, having assigned to the plaintiff, for the purpose of collection in that suit, a claim of several hundred dollars, which he held against the defendant company; and he was doubtless willing to use the utmost limit of his authority in order that the service had upon him might be made binding upon the company; and yet the sheriff at the time made return that he had executed the writs upon "Purmort, the foreman of the defendant company," which return is corroborative of Purmort's testimony, to the effect that he was only foreman of the mine, and that he so informed the sheriff at the time the service was made upon him. This service upon Purmort was not service upon the company.

Neither did the appearance of Gwynn bind the company. It is not seriously contended that Gwynn was authorized to appear for the defendant company. On the contrary, it clearly appears, from the evidence, that he was not so authorized, and such unauthorized appearance did not give the court jurisdiction of the defendant. And whatever rule may obtain in other localities upon the question of acquiring jurisdiction solely by the levy of the writ of attachment, we are of the opinion that, under our statute, there must be further notice and opportunity given for a hearing before condemnation: Civ. Code 1883, secs. 44, 45, 49, 99, 101; *Raynolds v. Ray*, 12 Col. 108, and authorities cited in former opinion.

These were the only questions passed upon in the former opinion, but upon this rehearing other and different questions have also been presented which have received our careful consideration. The claim is now made that the appellant was guilty of such laches as precludes a recovery in this action. Was the appellant guilty of laches? and if so, to what extent, and how is it affected thereby in this suit? An examination of the testimony shows that, at the time of the commencement of the attachment suits, Kellogg telegraphed from Denver to Purmort at the mines the amount due each of the creditors, who afterwards joined in the suit, as such amounts appeared upon the company's books. The reason for sending this telegram is not given, but it is assumed by counsel for the appellees that it was for the purpose of furnishing the necessary

information to enable certain creditors about the mine to institute suits against the company, and secure such advantage over Moynahan as might arise from their being able to anticipate the suit which he was then threatening to commence, and did in fact institute against the company the next day. In other words, it is claimed that Kellogg knew in advance that the Perkins suit was to be commenced, and it is conceded that, as he was a general agent, his knowledge, such as it was, was knowledge of the company; and it also appears that Purmort afterwards met Mr. Pomeroy, the president of the company, and Mr. Whittaker, its secretary, in Denver, and had some conversation with them in reference to both suits, and in that conversation Mr. Pomeroy said, in the presence of Mr. Whittaker, that "he would be able yet to raise the money before that property would be sold to pay off the attachments." This is the substance of the testimony in reference to information obtained by the company in relation to these suits. It does not affirmatively appear that any of the officers of the company knew of the judgments or of the sale of the real estate thereunder, and as a large amount of personal property was seized by the sheriff in the attachment suits, it is quite probable that these officers may have supposed that personal property alone had been seized. The officers of the company during all this time had the management and control of other mining enterprises, and it seems to have been a time of great depression in the business of mining, so that all these enterprises were languishing for want of capital to prosecute the same. Mr. Pomeroy was in the East, vainly endeavoring to raise money to tide over this period of depression, while Kellogg did not return to the mines, but devoted himself to other enterprises. Notice of the judgments, or of the sales made thereunder of the mines, is not brought home to the company, but on the contrary, all the officers of the company having anything to do with the management of its business in Colorado, and who were consequently at all likely to have obtained this information, swear positively that they knew nothing of such judgments or sales.

In considering the conduct of the appellant, it must also be borne in mind that complaint is not made of any affirmative act upon the part of the officers of the company by which the appellees were misled. By their silence alone, it is claimed, the company is barred from prosecuting this suit. It does not appear from the evidence that the appellees or their grantors

were misled by this silence into the expenditure of money to their detriment in improving this property, but on the contrary, it is shown that it was a valuable and productive property, yielding a large net revenue to those in possession since the sheriff's sales were made. Certainly, there is a wide distinction to be drawn between the case of an innocent purchaser who has erected valuable improvements upon the property, and a case in which it is shown that valuable ores have been extracted from the estate, and sold at a profit, as in this case: 2 Pomeroy's Eq. Jur., sec. 812. In fact, several of the elements essential to constitute an estoppel *in pais* are lacking in this case: *Id.*, sec. 805. In the case of *Gibbons v. Hoag*, 95 Ill. 67, in speaking of the question of laches, the court said: "The claim that appellee has been guilty of laches which should bar her right is destitute of merit. Mere delay alone, short of the period fixed as a bar by the statute of limitations, will not preclude the assertion of an equitable right. It is only when by delay, and neglect to assert a right, the adverse party is lulled into doing that which he would not have done, or into omitting to do that which he would have done, in reference to the property, had the right been promptly asserted, that the defense of laches can be considered. There is no pretense of any prejudice resulting to appellants by reason of the non-action of appellee in any respect."

The appellant was not informed of the false return or of the unauthorized appearance of Gwynn in time to proceed by motion to correct the same in the court where the attachment suits were pending, and had no notice of the sale of its real property until the time for redemption had expired, but, as soon as it did obtain information of the fraud perpetrated upon it, it was diligent in employing counsel and commencing this suit; and as this suit was brought within less than three years from the time of the perpetration of the fraud complained of, and within less than eighteen months from the time of the execution of the sheriff's deeds, and promptly upon the discovery of the fraud that had been practiced upon it, we think the appellant was chargeable with no such laches as should bar it from maintaining this action: *Gen. Stats.*, secs. 2172-2174; *Kayser v. Maughan*, 8 Col. 247; *Hagerty v. Mann*, 56 Md. 522; *Munson v. Hallowell*, 26 Tex. 475; 84 Am. Dec. 582; *Gibbons v. Hoag*, *supra*.

It is claimed, however, that, aside from this question of laches, the appellant's case is fatally defective, because it

appears that the judgments in the attachment suits were founded upon an indebtedness both just and due at the time the judgments were rendered, and if set aside, and a retrial of the case had, the result must be the same. Where the fraud of the party, as in this case, enters into the procurement of the judgment, it is doubtful if a court should require a showing of merits as a condition of relief. Then, again, while courts will not do an idle thing, and therefore will not ordinarily set aside a judgment when it appears, by reopening the case, the same judgment must be again rendered upon a trial of the cause upon its merits, yet courts frequently enjoin the collection of so much of judgments fraudulently obtained as is shown to be inequitable or excessive. And so, where sales or deeds have been made under such fraudulent judgments, courts have drawn a distinction between such sales and deeds and the fraudulent judgments themselves: *Litchfield's Appeal*, 28 Conn. 127; 73 Am. Dec. 662; *Martin v. Parsons*, 49 Cal. 94. Before a man's property is sold and deeded away, he should have an opportunity to pay the debt or redeem the property from sale. This right to redeem is a valuable right, secured by positive statutory enactment; which right, in this case, was denied appellant, and its property sequestered without notice to it. Under these circumstances, we believe that courts of equity should grant appropriate relief, without inquiry as to the merits of the original claim. As said in the former opinion, these judgments, as to appellant, "are absolute nullities," and consequently cannot be made the basis of a valid sale.

And if it be true that the third parties have purchased under the belief that the judgments were valid and binding between the parties, this will not defeat a recovery. "Nor does the fact that the real estate sold under the judgment has passed to third parties operate to defeat the right of plaintiff to show the want of jurisdiction or of authority to accept service": *Newcomb v. Dewey*, 27 Iowa, 381. This doctrine is supported in the following cases: *Harshey v. Blackmarr*, 20 Id. 161; 89 Am. Dec. 520; *Bryant v. Williams*, 21 Iowa, 329; *Shelton v. Tiffin*, 6 How. 163; *Ingle v. McCurry*, 1 Heisk. 26; *Martin v. Gray*, 19 Kan. 458; 27 Am. Rep. 149; *Ferguson v. Crawford*, 70 N. Y. 253; 26 Am. Rep. 589.

In the case of *Harshey v. Blackmarr*, *supra*, Judge Dillon, speaking for the court, uses this language in reference to a judgment obtained without service and upon an appearance

entered by an unauthorized attorney: "And this brings to us the more difficult question whether, assuming these facts, and the further fact that the demurrants in the case at bar are innocent purchasers of the land, the plaintiff is entitled to relief against them. . . . The most of the cases heretofore cited arose between the immediate parties to the judgment or decree. In their facts, therefore, they would not be wholly applicable to the present aspect of this case, though their principles have more or less bearing upon it. In arriving at the conclusion that the decree on the facts assumed would be wholly null and void as to the present plaintiff, we have been much fortified by finding that such would be the judgment of the civil law under such circumstances."

In the case at bar, the record entry does not show that service was made upon the defendant in either suit, and if we go to the officer's return, we find that by the first return Purmort is described as "foreman of the defendant company," which return was afterwards amended upon motion of plaintiff, so as to show that he was the general agent of the company, while in the return upon some of the other papers he is described as the resident agent. There was evidently much uncertainty in the mind of the officer as to the true capacity in which Purmort was acting at the time. It is said, however, that the officer's return, as amended, cannot be impeached. There is both reason and authority for holding that there is a wide distinction to be drawn between the recital in the officer's return of matters presumptively within his personal knowledge and the recital of matters, as in this case, not presumptively within such knowledge. The time upon which service was made, the county where made, the manner of service, were all matters presumptively within the personal knowledge of the officer. But the recitals in the various returns that Purmort was "the foreman of the defendant company," "the agent of the defendant company," "the resident agent of the company," etc., were recitals of matters not presumptively within his knowledge, but of matters about which an officer must determine the fact upon the best information at hand at the time, which information came in this case largely from interested parties. And we are aware of no decision holding that his return as to such finding of fact cannot be contradicted when properly attacked. In the case of *Bond v. Wilson*, 8 Kan. 231, 12 Am. Rep. 466, the court, in speaking of such return, says: "We know of no statute that makes a sheriff a final and exclusive

judge of where a man's residence is, or what is the age of a minor, or who are the officers of a corporation, or where their place of business is; and when the statute made it the duty of the sheriff to ascertain these facts, it did not make his return of such facts conclusive. Of his own acts, his knowledge ought to be absolute, and himself officially responsible. Of such facts as are not in his special knowledge, he must act from information, which will often come from interested parties, and his return thereof ought not to be held conclusive." And to the same effect are the following cases: *Chambers v. Bridge Manufactory*, 16 Kan. 270; *Hanson v. Wolcott*, 19 Id. 207; *Mastin v. Gray*, 19 Id. 468; 27 Am. Rep. 149; *Walker v. Lutz*, 14 Neb. 274.

The question of a defect of parties defendant is raised for the first time in this court; the claim advanced being that the plaintiffs in the attachment suits are indispensable parties to this action, without whom no decree can be entered in favor of the appellant. It appears from the pleadings and evidence that at the sales made under the judgments Moynahan and Gwynn purchased the property for the judgment creditors for an amount sufficient to satisfy the judgments, and afterwards sold it to the appellees for an amount largely in excess of the amount of such judgments, the appellees taking quitclaim deeds to the property, and they have, in turn, reaped a benefit out of working the property in an amount largely more than the purchase price paid by them. Neither Perkins nor Moynahan claims any interest in the property, and are not liable under the quitclaim deeds: 3 Washburn on Real Property, p. 356, sec. 4; *Adams v. Schiffer*, 11 Col. 15; 7 Am. St. Rep. 202. The case of *Allen v. Tritch*, 5 Col. 229, cited by counsel, is not analogous to the case at bar; for the reason that, although Allen had deeded away his interest in the land, the title to which was the subject of controversy, he had, to secure the purchase price, taken a mortgage upon the premises, and also a power of attorney to sell, convey, or lease the same, and consequently was held to be a necessary party. In the case of *Snyder v. Voorhes*, 7 Id. 296, it was held, upon demurrer to the bill, that "in an action to cancel and set aside a deed of record on the ground that it was never delivered, and its possession procured by the grantee by fraud, the grantee being dead, his heirs are necessary parties." But here the legal title was in the heirs, and consequently they were indispensable parties. In the case at bar, as neither Perkins nor Moynahan

had any interest in the property at the time of the bringing of this action, they are not indispensable parties, and a decree can be entered between the parties to this action without them: Civ. Code 1883, sec. 16; *Pollard v. Lathrop*, 12 Col. 171. If appellees desired their presence for any purpose, they should have taken the proper steps in the court below to have had them made parties, and not have consented, by their silence, to the case proceeding without them. Under our Code of Civil Procedure, "a defect or misjoinder of parties plaintiff or defendant" is made a ground of demurrer if such defect or misjoinder appears upon the face of the complaint, and when not appearing upon the face of the complaint, it is provided that the objection may be taken by answer. And the code also provides: "If no such objection be taken, either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the court and the objection that the complaint does not state facts sufficient to constitute a cause of action, which objections may be raised at any time": Code 1883, secs. 55, 59, 60. Appellees, having failed to make the objection of a defect of parties in the court below, either by demurrer or answer, must be deemed to have waived the same: *Hicks v. Jackson*, 85 Mo. 283; *Grain v. Aldrich*, 38 Cal. 514; 99 Am. Dec. 423. If, however, in the course of the subsequent proceedings in this case, the court should find it impossible to completely determine the controversy between the parties without the presence of Perkins and Moynahan, the court has the power to order them to be brought in: Civ. Code 1883, sec. 16.

In view of the circumstances of this case, we do not deem it advisable to enter a final decree in this court, but the case will be reversed and remanded, leaving counsel and the court below to pursue such course in relation to additional parties and further proceedings as they shall be advised.

Reversed and remanded.

CORPORATION — SERVICE OF PROCESS UPON: See note to *Hampton v. Wear*, 86 Am. Dec. 119-122. Service of process upon a conductor of a railroad car is sufficient service, under a statute authorizing expressly such a method of service: *New Albany etc. R. R. Co. v. Tilton*, 12 Ind. 3; 74 Am. Dec. 195; see *Gillespie v. Commercial etc. Ins. Co.*, 12 Gray, 201; 71 Am. Dec. 743; *Mineral Point R. R. Co. v. Keop*, 22 Ill. 9; 74 Am. Dec. 124; *Copen v. Pacific Mut. Ins. Co.*, 25 N. J. L. 67; 64 Am. Dec. 412. Corporations, being mere creatures of statute, must be sued only in the manner provided by the legislature: *Holgate v. Oregon P. R. Co.*, 16 Or. 123. The Colorado act of March 17, 1877, "providing a system of procedure in civil cases," etc., repealed the act of

March 14, 1877, with reference to service of summons in suits against corporations, and established a new method of service: *Little Bobtail Mining Co. v. Lighthourne*, 10 Col. 429.

AGENCY — WHO ARE GENERAL AGENTS: *Lister v. Allen*, 31 Md. 543; 100 Am. Dec. 78; *Savings Fund Society v. Savings Bank*, 36 Pa. St. 496; 78 Am. Dec. 390; *Lobdell v. Baker*, 1 Met. 193; 35 Am. Dec. 353. Who are special agents: *Savings Fund Society v. Savings Bank*, 36 Pa. St. 496; 78 Am. Dec. 390; *Billings v. Morrow*, 7 Cal. 171; 68 Am. Dec. 235.

CORPORATIONS MUST BE SUED at their domicile for damages resulting from their negligence or non-feasance: *Caldwell v. Vicksburg etc. R. R. Co.*, 40 La. Ann. 753; and the domicile of a corporation is deemed to be the county where it has its principal office or place of business: *Holgate v. Oregon P. R. R. Co.*, 16 Or. 123.

JUDGMENTS PROCURED BY UNAUTHORIZED APPEARANCE OF ATTORNEY. — Whether void, voidable, or conclusive: See extended note to *Buntion v. Lyford*, 75 Am. Dec. 146-151; compare also *Hubbard v. Dubois*, 37 Vt. 94; 36 Am. Dec. 690; *Dorey v. Kyle*, 30 Md. 512; 96 Am. Dec. 617; *Finnernan v. Leonard*, 7 Allen, 54; 83 Am. Dec. 685; *Callen v. Ellison*, 13 Ohio St. 446; 82 Am. Dec. 448.

UNAUTHORIZED APPEARANCE BY ATTORNEY — EFFECT OF. — An attorney cannot, without special authority, admit service of jurisdictional process upon his client: *Harshey v. Blackmar*, 20 Iowa, 161; 89 Am. Dec. 520; but see *Abbott v. Dutton*, 44 Vt. 546; 8 Am. Rep. 394; compare *Hill v. City Cab and Transf. Co.*, 79 Cal. 183.

JUDGMENTS RENDERED WITHOUT JURISDICTION ARE VOID: *Ferguson v. Jones*, 17 Or. 204; 11 Am. St. Rep. 808, and note 821, with the numerous cases there collected; *Vogel v. Brown School Township*, 112 Ind. 317. Void judgments are not conclusive upon either party: *Louisville etc. Ry Co. v. Hubbard*, 116 Id. 193. But record recitals are conclusive evidence of jurisdiction until set aside or reversed in a direct proceeding: *Ex parte Sternes*, 77 Cal. 156; 11 Am. St. Rep. 251, and note 256; *Goodwin v. Sims*, 86 Ala. 102; 11 Am. St. Rep. 21; *Ex parte Ah Men*, 77 Cal. 198; 11 Am. St. Rep. 263; note to *Melia v. Simmons*, 30 Am. Rep. 748-752. And where the court had jurisdiction, a judgment, although erroneous in all its parts, cannot be attacked collaterally: *Derr v. Wilson*, 84 Ky. 14.

DUE PROCESS OF LAW. — No one can be affected by a judgment unless he has been cited to appear, and given an opportunity to be heard: *Ferguson v. Jones*, 17 Or. 204; 11 Am. St. Rep. 808; *Landon v. Townshend*, 112 N. Y. 93; 8 Am. St. Rep. 712; extended note to *Flint River S. S. Co. v. Foster*, 48 Am. Dec. 272-278.

JUDGMENTS BASED UPON FALSE RETURNS OF OFFICERS — RELIEF AGAINST: See extended note to *Taylor v. Lewis*, 19 Am. Dec. 137-139. Defects as to the time and manner of service of process in actions before justices of the peace must be contested by motions to set aside the service, not by motions to dismiss the action: *Foster v. Markland*, 37 Kan. 82.

LACHES ALONE WILL NOT DEFRAT EQUITABLE RELIEF: *Townshend v. Townshend*, 4 Cold. 70; 94 Am. Dec. 185; *Higberger v. Stiffer*, 21 Md. 338; 63 Am. Dec. 593.

MISJOINDER OF PARTIES CANNOT BE RAISED ON APPEAL: *Filmore v. Wells*, 10 Col. 228; 3 Am. St. Rep. 567; *Beard v. Knox*, 5 Cal. 252; 63 Am. Dec. 125, and note; for objection to a misjoinder of parties must be taken advan-

lage of by demurrer when the defect appears on the face of the complaint, or by answer when it does not so appear: *Fillmore v. Wells*, 10 Col. 228; 3 Am. St. Rep. 567; *Donnell v. Walsh*, 33 N. Y. 43; 88 Am. Dec. 361; *Alcares v. Brannan*, 7 Cal. 503; 68 Am. Dec. 274, and note. But in actions ex contractu, an objection to non-joinder of parties plaintiff is not waived by a failure to plead in abatement: *Clapp v. Pawtucket Inst. for Savings*, 15 R. I. 489; 2 Am. St. Rep. 915.

UNION PACIFIC RAILWAY COMPANY v. DE BUSK.

[12 COLORADO, 204.]

VOLUNTARY APPEARANCE WAIVES ALL OBJECTIONS TO A SUMMONS and to the return thereof, and the filing of a demurrer or answer to the complaint constitutes such appearance.

PRACTICE—WAIVER OF DEFECTS IN SERVICE OF SUMMONS.—Though defendant attempts first by motion and then by plea to quash the service of summons, if on such motion and plea being determined against him he subsequently answers to the merits, such answer waives any pre-existing defects in such service.

EVIDENCE—SUFFICIENCY OF.—A JURY IS WARRANTED IN INFERRING THAT A FIRE WAS CAUSED BY A RAILWAY TRAIN of the defendants, when witnesses testified that the fire sprang up immediately upon the passing of such train, and that there was no fire on the premises before, and no apparent cause for fire.

FIRE—RESPONSIBILITY FOR.—By the ancient common law, a person in whose house a fire originated, which afterwards spread to and destroyed his neighbor's property, was forced to make good the loss, whether the person in whose house the fire originated was negligent in respect to the fire or not; and subsequently it was held that such person would be held responsible for fire in his field as well as in his house, on the ground that a person who makes a fire must see that it does no harm.

CONSTITUTIONALITY OF STATUTE IMPOSING LIABILITY FOR FIRE.—A statute is constitutional which declares "that every railroad corporation operating its line of road or any part thereof in this state shall be liable for all damages by fire that is set out or caused by operating any such line or any part thereof, and such damages may be recovered by the party damaged by a proper action in any court of competent jurisdiction." This statute is not penal, but remedial, and applies to corporations which have obtained their charters before as well as since its passage.

STATUTE REMEDIAL, WHAT IS.—A statute imposing liabilities upon railroad companies for all damages by fire that is set out or caused by the operation of its road is remedial in its nature, and applies to corporations which have obtained their charters before as well as since its passage, and should receive from all courts such reasonable and liberal interpretation as will justly promote its object.

ACTION by De Busk against railroad company to recover damages resulting from the burning of his hay. The fire by which the hay was burned was alleged to have been set by the

defendant's locomotive and cars while running through plaintiff's premises. The fire first caught in growing grass, and then spread to the hay. The summons had been served on one Armor as agent of the defendant. A motion was made to quash this service, on the ground that Armor was not an agent of the defendant upon whom summons could be legally served. This motion having been denied, the defendant then pleaded in abatement, praying that the summons and return thereof be quashed for the same reason. Issue having been joined and trial had upon this plea, the court found in favor of the plaintiff, and decided the service sufficient. Defendant then answered to the merits, denying the general allegations of the plaintiff, and affirmatively averring that the damages were not caused in any way or manner by the fault or negligence of the defendant. The court, upon plaintiff's motion, struck out the affirmative allegations of the defendant's answer, on the ground that they were irrelevant, redundant, immaterial, and insufficient. The case was then tried. The defendant moved for a nonsuit at the close of the plaintiff's testimony, upon the ground that the court had not acquired jurisdiction, that the complaint did not state a cause of action, and that there was no evidence connecting the defendant with the fire. The motion was denied. The defendant offered no evidence. The court, at plaintiff's request, instructed the jury that if they believed from the evidence that plaintiff was the owner of the hay, and that it was consumed or injured by fire caused by the escaping of sparks from defendant's locomotive, then the defendant was liable, and that the measure of damages was the value of the hay consumed. The court denied an instruction presented by the defendant to the effect that the jury should find a verdict in its favor, unless they believed from the evidence that the fire testified to occurred through the fault or negligence of the defendant. Verdict and judgment for plaintiff. Defendant moved for a new trial, which was overruled. It then appealed to this court.

Teller and Orahood, and E. R. French, for the appellant.

J. W. Horner, for the appellee.

ELLIOTT, J. The early decisions in this state have been uniform to the effect that by a general voluntary appearance all objections to the summons and return thereof, and to the jurisdiction of the court over the person of the defendant, are waived; and that the filing of a demurrer or answer to the

complaint constitutes such an appearance: *Jones v. Stevens*, 1 Col. 67; *Creighton v. Kerr*, 1 Id. 509; *Wyatt v. Freeman*, 4 Id. 14; *Smith v. District Court*, 4 Id. 235. The code of 1877 contains the following provisions, which have remained unchanged since that date:—

“Sec. 46. From the time of the service of the summons in a civil action, the court shall be deemed to have acquired jurisdiction, and to have control of all subsequent proceedings. A voluntary appearance of a defendant shall be equivalent to personal service of the summons upon him.”

“Sec. 396. A defendant shall be deemed to appear in an action when he answers, demurs, or gives the plaintiff a written notice of his appearance.”

In the face of these plain, unqualified provisions, the dearth of recent Colorado authorities upon the subject may be readily accounted for.

The decision in *Western Union Tel. Co. v. Conant*, 11 Col. 111, in no way militates against the foregoing views. In that case the defendant “appeared specially,” and moved to quash on the ground that the summons was not served upon the proper agent. The motion being denied, the defendant “made no further appearance,” but proceeded by *certiorari* to reverse the judgment for want of jurisdiction. There was no general appearance. The merits of the case were not contested in the court below. The case of *Lyman v. Milton*, 44 Cal. 630, if in conflict with the foregoing, cannot be accepted as authority. In that case it seems the court refused to permit a special appearance on behalf of an infant, for the purpose of moving to quash a defective summons. There was no such refusal in this case. On the contrary, the defendant was permitted to attempt—first by motion and then by plea—to quash the return of the writ.

The evidence was sufficient to warrant the inference that the fire was caused by the defendant's passing train, as alleged in the complaint; several witnesses testifying in substance to the springing up of the fire immediately upon the passing of the train, and that there was no fire on the premises before, and no other apparent cause for the fire. From the nature and circumstances of such cases, considerable latitude must be allowed in the introduction of testimony, and in the drawing of inferences as to the origin of the fire: 1 Thompson on Negligence, 159; *Union Pac. R'y Co. v. Jones*, 9 Col. 379; *Butcher v. Vaca Valley R. R. Co.*, 56 Cal. 598.

By the ancient common law it was held that a person in whose house a fire originated, which afterwards spread to his neighbor's property and destroyed it, was forced to make good the loss, whether the person in whose house the fire originated was negligent in respect to the fire or not; and subsequently it was held that such person would be responsible for fire in his field as well as in his house, on the ground that a person who makes a fire must see that it does no harm, and must answer the damage if it does any. *Sic utere tuo ut alienum non lædas*. As late as 1858, in the English court of exchequer, Bramwell, B., used the following language to the jury: "If, to serve his own purposes, a man does a dangerous thing, whether he take precautions or not, and mischief ensues, he must bear the consequences; that running engines which cast forth sparks is a thing intrinsically dangerous; and that if a railway engine is used which, in spite of the utmost care and skill on the part of the company and their servants, is dangerous, the owners must pay for any damage occasioned thereby." But in 1860 it was held, on an appeal of the case to the exchequer chamber, reversing the court of exchequer, that a railway company authorized by the legislature to use locomotive-engines is not responsible for damages by fire occasioned by sparks emitted therefrom, provided it has taken every precaution in its power, and adopted every means which science can suggest, to prevent injury from fire, and is not guilty of negligence in the management of the engine: *Vaughan v. Taff Vale R'y Co.*, 5 Hurl. & N. 687; see 1 Thompson on Negligence, 122 et seq., and notes.

Colorado having adopted the common law of England so far as applicable, etc., and the acts of the British Parliament in aid thereof, etc., as they existed prior to the fourth year of James I. (Laws of 1861, p. 35), it would seem as a first impression that our statute making railway companies unconditionally responsible for their fires is not a change of the law, but declaratory merely. But for some reason, perhaps because the common law in reference to the liability for damages caused by accidental fires was not considered applicable to our condition as a new-country, the uniform current of decisions in America has been, in the absence of statute, to the effect that negligence or misconduct is the gist of the liability of railroad companies for injuries caused by fires escaping from their engines; though the authorities are in hopeless conflict as to which party must assume the burden

of proof in such cases. Generally the burden of proving negligence rests upon the party alleging it.

Hence the rule is held in many states that the plaintiff must offer some proof tending to show negligence on the part of the railroad company, and that the destruction of property by fire does not of itself raise a presumption of negligence. It is said the plaintiff must go further, and prove some positive act of negligence, or at least something from which it may be inferred,—as the defective construction of the engine, the unusual size of the sparks, the improper velocity of the train, or the like. On the other hand, in nearly if not quite as many states, the rule is held that, the origin of the fire being proved against the railroad company, the burden devolves upon the company to show that it has used all necessary precautions to avoid doing such mischief. The reasoning in support of the latter rule may be stated thus: Since the railroad company is not to be held responsible for damages occasioned by fire from its engines, provided it has not been guilty of negligence in the management of its engine, and has taken every precaution in its power, and adopted every means which science can suggest, to prevent injury from fire, therefore it must prove these affirmative acts of diligence in order to bring itself within the terms of the proviso. It is said with great force that this does not require the company to prove a negative, nor is it an unreasonable burden, since the company is presumably possessed of the necessary information in regard to the construction and working of its engines, and can readily show, if such be the fact, that it has employed careful and competent servants, and that it has used the most improved appliances to prevent the escape of fire from its engines; while a party litigating against a railroad company can hardly be expected to have the means of showing whether, in the construction of the engine, or in the use of it at the time of the injury, the company was or was not guilty of negligence: *Shearman and Redfield on Negligence*, sec. 333; 1 *Thompson on Negligence*, sec. 153; *Railroad Co. v. Schultz*, 2 *Am. & Eng. R. R. Cas.* 276.

From the multitude of decisions in cases of this kind, it appears that the courts have been extremely liberal in allowing a recovery in favor of the party suffering damage caused by fire from passing trains. Even in cases where the proof of negligence is cast upon the plaintiff, slight circumstances have been held sufficient to sustain the burden. The origin of the

fire has generally been held sufficiently established by inferences drawn from slight circumstantial evidence. Recoveries have been allowed where the damages have resulted from fires indirectly communicated; and as a general rule, the courts have refused to restrict the recovery to those cases where the fire has been communicated directly from the engine to the property injured: *Hart v. Western R. R. Corp.*, 13 Met. 99; 46 Am. Dec. 719; *Pratt v. Atlantic etc. R. R. Co.*, 42 Me. 579; *Lyman v. Boston etc. R. R. Corp.*, 4 Cush. 288; *Pierce v. Worcester etc. R. R. Co.*, 105 Mass. 199. In this condition of the law, as announced by the decisions of the courts, it is not surprising that some of the states have sought by legislation to further regulate the liability of railroad companies for damages resulting from fires caused by the operation of their trains. In 1874 our territorial legislature enacted the following: "That every railroad corporation operating its line of road, or any part thereof, in this state, shall be liable for all damages by fire that is set out or caused by operating any such line of road, or any part thereof, and such damages may be recovered by the party damaged by the proper action in any court of competent jurisdiction": Gen. Stats. Col., p. 812, sec. 2798. Various objections have been urged against the constitutionality of acts of this kind. For example, it has been claimed,—

1. That they are the means of depriving a railroad company of its property "without due process of law";
2. That they deny to railroad corporations "the equal protection of the laws";
3. That they are acts "impairing the obligations of contracts";
4. That they interfere with the powers of Congress to "regulate commerce among the several states."

Let us consider the reasoning of some of the principal authorities relied upon as denying, as well as those asserting, the constitutionality of such acts. The legislature of Alabama passed an act providing that railroad companies in that state should be liable for all damages to live-stock or cattle of any kind caused by their locomotive or railroad cars. The supreme court of that state expressed its opinion in respect to said act as follows: "Due process of law implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty, or property, in its most comprehensive sense, to be heard, by testimony or otherwise, and to have the right of controverting, by proof, every material fact which bears on the question of right in the matter involved. If any question

of fact or liability be conclusively presumed against him, this is not due process of law. . . . It is within the power of legislation to declare that certain proofs shall be *prima facie* evidence of specified facts. But at the same time we decided that the legislature could not constitutionally ordain that such proofs should be conclusive evidence of material facts in controversy. The first is a mere rule of evidence. The last has been characterized as 'a confiscation of property.' . . . The statute under discussion dispenses with all proof of the most material element of the wrong it seeks to redress. It declares that the railroad corporation shall make reparation for an injury inflicted in the authorized prosecution of its lawful business, without a semblance of fault, negligence, or want of skill in its employees,—an injury which no human prudence or foresight could prevent; and yet the statute will not allow the railroad to exculpate itself by proof of the highest qualifications and most watchful vigilance. This falls short of due process of law": *Zeigler v. South etc. R. R. Co.*, 58 Ala. 599. The opinion of the Alabama court above referred to, though not based upon a statute relating to damages by fire, is nevertheless an authority bearing legitimately upon the question under consideration. Upon careful examination, however, we cannot follow it. We think the language altogether too broad and sweeping. Such reasoning would compel us to declare certain sections of the statute of frauds, as well as other conclusive presumptions of law, unconstitutional.

"It is a principle of the common law," says the Iowa supreme court in an opinion hereinafter cited, "that the owner of vicious domestic animals shall not be liable for the injuries they inflict, until he has had knowledge of their vicious propensities, and neglects to restrain them. Yet it would scarcely be claimed that an act of the legislature making the owner liable for such injuries, without such knowledge, would be unconstitutional. That would be a case in which one of two equally innocent persons must suffer; and it certainly would be as competent for the legislature to declare that the loss shall be borne by the owner of the animal as it now is for the common law to visit the loss on the person injured."

The constitution of California provides, in substance, that the property of all persons, except railroad and other *quasi* public corporations, shall be assessed for taxation at the value thereof, less the amount of any mortgage encumbrance thereon, but that the franchise, roadway, road-bed, rails, and

rolling stock of all railroads operated in more than one county shall be assessed at their actual value, without deduction for any mortgages on the property. In an action to recover the taxes from a railroad corporation, it was held by the United States circuit court, Field and Sawyer, JJ., that railroad corporations were persons within the meaning of the fourteenth amendment to the constitution of the United States, and that the foregoing provision of the constitution of California was in conflict with said amendment in that it deprived railroad corporations of "the equal protection of the laws," by imposing upon them unequal taxation: *County of San Mateo v. Railroad Co.*, 13 Fed. Rep. 722; 8 Am. & Eng. R. R. Cas. 1.

In determining the constitutionality of statutes, it must be borne in mind that every act which has received the sanction of the general assembly is to be considered constitutional, unless the contrary appears beyond reasonable doubt. The precise point of conflict between the statute and the constitution—state or national—must appear plain, palpable, and inevitable, or else the act of the general assembly must be held to prevail. It is clear that the state of California, by the provisions of the constitution referred to, expressly discriminated in favor of private individuals and against railroad corporations in the matter of assessment and taxation, and thus attempted to deprive railroad corporations of "the equal protection of the laws" guaranteed by the constitution of the United States. There could be no doubt as to the meaning or effect of the California constitution as to that particular matter. But no discrimination was either expressed or intended in favor of private individuals or against railroad corporations by our statute making them liable for damages by fire caused by the operation of their trains. The object of the statute was to give an adequate remedy to those who should suffer damages from fire caused by the operation of locomotive-engines by the dangerous agency of steam. The object of the act was not to punish railroad corporations, but was to declare upon whom the loss must fall in case damage by fire should ensue by the operations of railroads. In the act under consideration the legislature evidently used the words "railroad corporation" in their popular sense, as denoting any party engaged in the operation of railroads. It was a matter of common knowledge then, as it has been ever since, and is now, that railroads were operated only through the agency of corporations. Hence there was in fact no chance for discrimination,—no

chance to deprive any one of "the equal protection of the laws,"—by declaring a liability against "railroad corporations" only, since they only were thus engaged in operating railroads.

We have seen that the word "persons" was held to be comprehensive enough to include corporations, and thus the constitution of California was declared to be in conflict with the constitution of the United States. In passing upon the constitutionality of this act of our territorial legislature, we think the words "railroad corporations" should be construed to mean any body, company, or association of persons, whether technically incorporated or not, engaged in the operation of railroads. We feel bound to go thus far in construing the language of the act,—1. For the reason that such was obviously the meaning intended by the legislature; and 2. To avoid the necessity of declaring the act unconstitutional. Whenever a word or phrase of an act is used in more senses than one, that sense is always to be preferred which will sustain and give effect to the act, rather than the sense which would render the act unconstitutional and void.

The legislature of Michigan granted a charter to a plank-road company, subject to alteration, amendment, or repeal after thirty years, but not before, "unless it shall be made to appear to the legislature that there has been a violation by the company of some of the provisions of this act." In less than thirty years the legislature passed an act, without preamble or recital, to repeal the charter. In a case brought to test the validity of the repealing act, Mr. Justice Cooley used the following language: "The charter of a private corporation is to be regarded as a contract whose provisions are binding upon the state, and cannot be set aside at the will of the legislature. Such a charter is a law, but it is also something more than a law, in that it contains stipulations which are terms of compact between the state as the one party, and the corporators as the other, which neither party is at liberty to disregard or repudiate, and which are as much removed from the modifying and controlling power of legislation as would be the contracts of private parties."

The opinion of Judge Cooley, holding the repealing act unconstitutional, was not based upon the proposition that additional burdens or liabilities had been imposed upon the corporation by a subsequent statute, but the holding was, that the determination of the question whether or not the company

had violated its charter was a judicial, and not a legislative, act, and that the company had a right to a trial before its charter could be rightfully forfeited: *Flint etc. Plank Road Co. v. Woodhull*, 25 Mich. 99; 12 Am. Rep. 233. The same distinguished jurist and eminent author, in his work on Constitutional Limitations (pp. 710-712, 5th ed.), says: "The occasions to consider the clause of the constitution of the United States which forbids the states passing any laws impairing the obligation of contracts have been frequent and varied; and it has been held without dissent that this clause does not so far remove from state control the rights and properties which depend for their existence or enforcement upon contracts as to relieve them from the operation of such general regulations for the good government of the state and the protection of the rights of individuals as may be deemed important. . . . Although these charters are to be regarded as contracts, and the rights assured by them are inviolable, it does not follow that these rights are at once, by force of the charter contract, removed from the sphere of state regulation, and that the charter implies an undertaking on the part of the state that in the same way in which their exercise is permissible at first, and under the regulations then existing, and those only, may the corporators continue to exercise their rights while the artificial existence continues. The obligation of the contract by no means extends so far; but, on the contrary, the rights and privileges which come into existence under it are placed upon the same footing with other legal rights and privileges of the citizen, and subject in like manner to proper rules for their due regulation, protection, and enjoyment."

The statute of New Hampshire is as follows: "The proprietors of every railroad shall be liable for all damages which shall accrue to any person or property by fire or steam from any locomotive or other engine on such road." In an action brought upon this statute the objection was raised that it interfered with the power of Congress to "regulate commerce among the several states." The question was elaborately presented in the briefs of counsel; but the supreme court, without discussing the question, held that the objection could not be maintained; that federal authority was against it; and rendered judgment sustaining the statute: *Smith v. Boston etc. R. R.*, 63 N. H. 25. As this particular point has not been urged in the case at bar, we shall not further consider it in this opinion.

Maine and Massachusetts have statutes similar to our own, which have been upheld by a long line of decisions. Chief Justice Shaw, delivering the opinion of the court in *Hart v. Western R. R. Corp.*, 13 Met. 99, 46 Am. Dec. 719, used the following language: "We consider this to be a statute purely remedial, and not penal. Railroad companies acquire large profits by their business. But their business is of such a nature as necessarily to expose the property of others to danger; and yet, on account of the great accommodation and advantage to the public, companies are authorized by law to maintain them, dangerous though they are, and so they cannot be regarded as a nuisance. The manifest intent and design of this statute, we think, and its legal effect, are, upon the considerations stated, to afford some indemnity against this risk to those who are exposed to it, and to throw the responsibility upon those who are thus authorized to use a somewhat dangerous apparatus, and who realize a profit from it."

In 1873 the state of Iowa adopted a statute almost identical with our own. It provided "that any corporation operating a railway shall be liable for all damages by fire that is set out or caused by the operating of any such railway," etc. In an action brought thereunder the defense was made that the act was unconstitutional, as "impairing the obligations of contracts." Upon this defense the supreme court said: "Any legislation which deprives the defendant of the right to operate its road would clearly be an infraction of contract, and unconstitutional. But there is no implied contract between a state and a corporation that there shall be no change in the laws existing at the time of the incorporation which shall render the use of a franchise more burdensome or less lucrative, any more than there is between the state and an individual that the laws existing at the time of the acquisition of property shall remain perpetually in force. An individual may turn all his real estate into money for the purpose of making loans when the legal rate of interest is ten per cent, yet there can be no doubt that a legislature could afterwards reduce the legal rate to six per cent, thus materially lessening his profits and affecting the value of his property. And the same thing can be done with respect to a corporation. . . . It took its charter subject to the general laws, and of course subject to such changes as shall be rightfully made in such laws. The legislature surely did not guarantee to the corporation that there should be no change in the laws. . . . It is

true, the generally received doctrine is, that for a lawful and reasonably careful use of property the owner shall not be answerable in damages; but this is simply a principle of a common law. It is not so wrought into the idea of property, nor is it so hedged about by the constitution, that the legislature may not change it. . . . The statute simply recognizes the doctrine that the use of a locomotive-engine is the employment of a dangerous force; that sometimes, notwithstanding the exercise of the highest care and diligence, it will emit sparks and cause destructive conflagrations; that when this occurs loss must fall upon one of two innocent parties; that heretofore that loss has been borne by the owner of the property injured; hereafter it shall be borne by the owner of the property causing the injury": *Rodemacher v. Mil. etc. R'y Co.*, 41 Iowa, 297; 20 Am. Rep. 592."

We have thus noticed, at considerable length, some of the principal decisions bearing upon the question of the constitutional validity of statutes similar to our own. It will be observed that the decisions relied upon as denying the constitutionality of such acts relate to statutes upon subjects other than damages caused by fire. We are not aware that the supreme court of any state having an act like that of ours has declared the same unconstitutional. We come to the conclusion that such statutes are not penal, but purely remedial in their nature; that they apply to corporations which obtained their charters before as well as since their passage; that they should receive from the courts a reasonable and liberal interpretation and construction, such as will justly promote their object. By many courts the warrant for their enactment is ascribed to the police power of the state; but we have not found it necessary to attempt a particular classification in order to sustain their validity. Statutes practically identical with our own were passed, construed, and upheld by the decisions of several states for many years before ours was enacted; and we see no reason why Colorado should take the lead in declaring such acts unconstitutional: *Ross v. Boston etc. R. R. Co.*, 6 Allen, 90; *Pratt v. Atlantic R. R. Co.*, 42 Me. 579; *Thorpe v. Rutland etc. R. R. Co.*, 27 Vt. 140; 62 Am. Dec. 625; *Denver etc. R'y Co. v. Henderson*, 10 Col. 1.

Undoubtedly the enforcement of such acts will stimulate railroad companies to the greatest diligence to prevent fires from the operation of their roads. If they are found to bear too severely upon railroad companies, the legislature may be

relied upon to give relief by modification or repeal. A hundred years ago when a man's house burned without any negligence on his part,—a case of pure accident,—and the fire caused the burning of his neighbor's house, it was deemed a harsh law that required him to make good his neighbor's loss as well as to bear his own; and so resort was had to an act of Parliament to remedy the supposed hardship: 14 Geo. III., c. 78. The adoption of the statute in this and other states making railroad companies liable for damages by fire caused by the operation of their locomotive-engines is but the re-enactment *pro tanto* of the ancient common law for the better protection of property exposed to such unusual dangers. Such matters are peculiarly within the control of the local legislatures, and such laws may be enacted, changed, or repealed to suit the varied conditions and circumstances of the people. Human laws at best are largely experimental, and especially in all free states we may expect frequent changes, as the wants and necessities of the people may require, or as their experience and judgment may suggest. The judgment of the district court is affirmed.

APPEARANCE IN ACTIONS. — General appearance waives all questions as to service of process, and is equivalent to a personal service: *Kinkade v. Myers*, 17 Or. 470; *Denver etc. R'y Co. v. Neis*, 10 Col. 56; *Naye v. Nozel*, 50 N. J. L. 522; *Reed v. Cates*, 11 Col. 527; *Stamphill v. Franklin County*, 86 Ala. 392. So by filing an appeal bond a party may waive jurisdiction of an appellate court: *Charles v. Ames*, 10 Col. 272. But a special appearance for a special purpose does not have the effect of waiving jurisdiction over the person: *Cheapsaks etc. R. R. Co. v. Heath*, 87 Ky. 651; *Kinkade v. Myers*, 17 Or. 470; *Duiley v. Kennedy*, 64 Mich. 206; yet any acknowledgment of a court's jurisdiction, when the party has entered appearance voluntarily, waives his right to object to such jurisdiction: *Barbour v. Newkirk*, 83 Ky. 529; *Kaw L. Ass'n v. Lemke*, 40 Kan. 142.

RAILROADS — FIRE. — A statute making a railroad company liable for injuries to property by fire communicated from a locomotive is constitutional: *Grissell v. Housatonic R. R. Co.*, 54 Conn. 447; 1 Am. St. Rep. 135; *Rodemacher v. Railroad Co.*, 41 Iowa, 297; 20 Am. Rep. 592.

RAILROADS — FIRES COMMUNICATED FROM LOCOMOTIVES — PLEADING. — Negligence of the railroad company need not be specifically alleged in an action to recover for damage occasioned by fire from a locomotive: *Ross v. Chicago etc. R'y Co.*, 72 Iowa, 625; compare *Independence Mills Co. v. Burlington etc. R'y Co.*, 72 Id. 535.

RAILROADS — FIRE COMMUNICATED FROM LOCOMOTIVE — EVIDENCE. — When damage occurs from fire from a railroad engine, negligence is presumed on the part of the company, under the Iowa code: *Ross v. Chicago etc. R'y Co.*, 72 Iowa, 625; and such is the rule in Texas: *Galveston etc. R'y Co. v. Horne*, 89 Tex. 643; compare *Bentham v. St. Paul etc. R'y Co.*, 36 Minn. 522. The burden of proof is upon the railroad company to show a want of negligence

on its part, where it appears that fire escaped from its locomotive and caused damage to property: *Galveston etc. R'y Co. v. Horne*, 69 Tex. 643; *Bentham v. St. Paul etc. R'y Co.*, 36 Minn. 522; *Missouri P. R'y Co. v. Bartlett*, 69 Tex. 79. Plaintiff cannot prove that other fires had been set by other engines, in rebuttal of the testimony of defendant's inspector, who said that the screen upon the engine in question was the same as on the other engines of defendant: *Allard v. Chicago etc. R'y Co.*, 73 Wis. 165.

REMEDIAL STATUTES — CONSTRUCTION OF. — Remedial statutes must be construed liberally: *White v. Mary Ann*, 6 Cal. 462; 65 Am. Dec. 523; *Freeland v. McCullough*, 1 Denio, 414; 43 Am. Dec. 685; *Tucker v. Constable*, 16 Or. 407.

DENVER CITY IRRIGATION AND WATER COMPANY v. MIDDLEAUGH.

[12 COLORADO, 424.]

JURISDICTION OF CONDEMNATION PROCEEDINGS. — County courts of Colorado have no jurisdiction in condemnation proceedings where the award exceeds two thousand dollars.

ESTOPPEL. — ONE WHO ACCEPTS AND RETAINS THE FRUITS OF A VOID JUDGMENT is estopped from assailing it or denying its validity as against him. This is true, though the court had no jurisdiction over the subject-matter.

JUDGMENT IS CONCLUSIVE BETWEEN THE PARTIES, NOT ONLY AS TO SUCH MATTERS as were in fact determined in that proceeding, but as to every other matter which the parties might have litigated as incident to or essentially connected with the subject-matter of the litigation, whether the same, as a matter of fact, were or were not considered.

DAMAGES, WHAT INCLUDED IN JUDGMENT OF CONDEMNATION. — Damages resulting from seepage and leakage from a ditch or reservoir, and not arising from the negligent or unskillful construction or use thereof, must be deemed as included in the judgment condemning lands for the construction of certain canals, lakes, and reservoirs.

DAMAGES RECOVERABLE FOR THE SEIZURE OF LANDS UNDER THE RIGHT OF EMINENT DOMAIN INCLUDE all damages which are the natural, necessary, or reasonable incidents of the improvement, but not such as rise from negligence or unskillful construction or use thereof.

IN ASSESSING DAMAGES IN CONDEMNATION PROCEEDINGS for lands taken for the purpose of constructing a canal, ditch, or reservoir thereon, injuries likely to result from seepage or leakage should be considered by the jury, and if not considered by the jury, cannot be recovered in a subsequent action or proceeding.

DAMAGES FOR NUISANCE. — IF TRESPASSES AND NUISANCES ARE NOT OF A PERMANENT CHARACTER, damages can be recovered only for the injury sustained up to the time of the commencement of the action; but as to trespasses and nuisances that are of a permanent character, a single recovery may be had for the whole damages resulting from the act.

ACTION to recover damages which the plaintiff alleged had resulted from the construction of the defendant's canal and

reservoir on lands adjacent to plaintiff's. The plaintiff alleged that this canal and reservoir were so unskillfully constructed that water percolated, penetrated, and ran through the banks and bottom thereof, over, under, through, and above the plaintiff's lands. In the years 1878 and 1879 proceedings were instituted in the county court of Arapahoe County to condemn the right of way through, over, and across the lands of plaintiff for the construction of certain canals, lakes, and reservoirs. The land embraced in such condemnation proceedings included those for which plaintiff sought to recover damages in the present action. The court in which the condemnation proceedings were conducted condemned 16.80 acres of plaintiff's land, awarding him \$2,163.75 damages therefor, and also awarding him the further sum of \$1,500 for damages to that portion of his lands not taken. The sums so awarded were received and accepted by plaintiff. In the present action, the defendant asserted and the plaintiff denied that the damages here sought to be recovered were involved in the issues formed by said condemnation proceedings, and that the awards there made and received constituted a full satisfaction and bar to the present action. The jury returned a verdict in favor of the plaintiff, assessing his damages at three thousand five hundred dollars. The defendant appealed.

Decker and Yonley, and George H. Kohn, for the appellant.

Patterson and Thomas, for the appellee.

HAYT, J. The county court was without jurisdiction in the condemnation proceedings, the amount of award being in excess of two thousand dollars: *Denver etc. R. R. Co. v. Church*, 7 Col. 143; *Denver etc. R'y Co. v. Otis*, 7 Id. 198. A decision had not, however, been rendered in either of the cases cited at the time of the trial in the county court, and the parties to the condemnation proceedings treated the same as valid, the appellant paying and the appellee accepting the amount of the judgment awarded by that court. The appellant shortly thereafter entered into the possession of the lands condemned, and has since occupied the same, with its ditch and reservoir. Under these circumstances, it becomes necessary to determine the *status* of the party under such void proceedings. It is a familiar principle of the law that a party accepting and retaining the fruits of a void judgment is estopped from assailing the judgment itself: *Kile v. Town of Yellowhead*, 80 Ill. 208; *Town v. Town of Blackberry*, 29 Id. 137; *Felch v. Gilman*,

22 Vt. 39; *Embury v. Conner*, 3 N. Y. 511; 53 Am. Dec. 325; *Hitchcock v. Danbury etc. R. R. Co.*, 25 Conn. 516. In none of the cases cited, however, did it become necessary to determine the effect of receiving the benefits of a judgment void for the want of jurisdiction in the court over the subject-matter of the suit, although the language used in some of the opinions is broad enough to cover such cases.

In the case at bar, the court below, in some of the instructions given to the jury, seems to have drawn a distinction between the case of a party accepting the fruits of a judgment rendered by a court without jurisdiction of the subject-matter and a case in which the party has received the fruits of a judgment voidable for the want of jurisdiction over the person, or on account of some informality occurring in the proceedings antecedent to judgment; but this theory is expressly waived by counsel for appellee in their argument filed in this court, and, after diligent search, I have been unable to find any authority in support of the theory of the trial court. Nothing in the testimony indicates that, at the time the appellant paid and the appellee received the amount of the judgment of the county court, either party entertained a suspicion of the invalidity of such judgment; and, under these circumstances, we must presume that both parties were acting in good faith, under the belief that the proceedings in that court were valid and binding, and that the judgment there rendered had all the force and effect of a valid judgment, and that the money was paid and the land taken with this understanding. And as appellee, after the notice of the invalidity of such proceeding, continued to retain the money so paid, I am of the opinion that he is estopped from denying the validity of such judgment, and that he should be held bound by that adjudication the same as he would have been had the court had complete jurisdiction, and that, for the purposes of this action, the same should be treated in all respects as a valid judgment: See *Kile v. Town of Yellowhead*, and other cases cited *supra*.

It appears, from the testimony adduced upon the trial in the district court, that a large number of witnesses were examined in the condemnation proceedings in reference to the damages that would probably result to appellee's land by reason of seepage and leakage of water from the ditch and reservoir; and, under the instructions of the county court, the jury were permitted to consider and allow for such damages in

that proceeding if they saw proper; but it does not affirmatively appear that such elements of damage were, in fact, allowed. One juror, sworn as a witness upon the trial in the district court, testified that damages for seepage and leakage were not allowed; other jurors testifying that such matters were taken into consideration by the jury, but could not state whether any damages were allowed for the same or not. Under such circumstances, I think it would be very difficult to say just what consideration influenced the mind of each juror in the condemnation proceeding in arriving at the conclusion that the sum of fifteen hundred dollars should be allowed the appellee as proper compensation for the damages to result to the balance of his land; but if the judgment of the county court is to be treated as valid, the consideration of this question is not material; for a valid judgment is conclusive between the parties, not only as to such matters as were, in fact, determined in that proceeding, but as to every other matter which the parties might have litigated as incident to, or essentially connected with, the subject-matter of the litigation, whether the same, as a matter of fact, were or were not considered: Freeman on Judgments, sec. 249; *Sabin v. Vermont etc. R. R. Co.*, 25 Vt. 363. This principle was recognized by the learned judge in the trial below, in the instructions to the jury, upon defendant's plea of *res judicata*; for, after telling the jury that the plaintiff could not recover for the damages in fact allowed by the jury in the county court, they were also instructed that the law presumed that all past, present, and future damages which the improvement would cause, so far as the same might have been reasonably foreseen or anticipated, were included in the award of the jury in the condemnation proceedings. Under these and other instructions, the jury were left, however, to determine whether the damages claimed might have been reasonably foreseen or anticipated by the jury in the condemnation proceeding, and if not, they were instructed that the appellee might recover for such damages in this action as well as for damages arising from unskillful or negligent construction or use of the ditch or reservoir, and this is assigned for error.

Upon my first examination of this case I was of the opinion in opposition to the views of the chief justice, that there was no error in these instructions; but upon reflection, and after an examination of the authorities, I have concluded that my first impressions were erroneous, and that the rule in reference

to the conclusiveness of condemnation proceedings under statutes similar to our own, which is supported by the better considerations and recognized by the strong weight of judicial authority, requires us to hold that damages resulting from seepage and leakage from the ditch and reservoir, not resulting from negligent or unskillful construction or use thereof, ought to have been foreseen and allowed in the condemnation proceedings,—consequently are not recoverable in this action, no matter whether such damages were, as a matter of fact, allowed or not. It is provided by our statute that in condemnation proceedings the owner or parties interested in the real estate taken shall be awarded damages, not only for the land or property taken, but also the damages, if any, resulting to the residue of such land or property. The reported cases under similar statutes have generally treated of the damages recoverable for the seizure of land under the right of eminent domain, for railroad or highway purposes; and so far as I have investigated the decisions, I find the general current of authority to be that all the damages, present and prospective, that are the natural, necessary, or reasonable incident of the improvement, must be assessed in the condemnation proceedings, not including such as may arise from negligent or unskillful construction or use thereof: *Mills on Eminent Domain*, sec. 216; *Sabin v. Railway Co.*, *supra*; *Aldrich v. Cheshire R'y Co.*, 21 N. H. 359; 53 Am. Dec. 212; *Chicago etc. R'y Co. v. Hopkins*, 90 Ill. 316; *Sawyer v. Keene*, 47 N. H. 173; *Van Schoick v. Delaware etc. Canal Co.*, 20 N. J. L. 249.

An examination of the reported cases shows that there is no substantial difference in the general rules applicable to the assessment of damages in condemnation proceedings, as announced by the courts of last resort, but in the application of such rules to particular cases the same uniformity has not been observed; still no case has been called to our attention which by any fair construction can be held to be in conflict with the conclusion that damages for seepage and leakage should have been determined in the first proceeding. In *Sabin v. Vermont etc. R. R. Co.*, 25 Vt. 363, plaintiff was allowed to recover for injuries arising from the making and use, in constructing its railroad, of an ordinary cartage road upon plaintiff's adjoining land by the railroad company. In the case of *Railway Co. v. Magruder*, 34 Md. 79, the facts were, that the right of way for a railroad had been condemned through the farm of M., and in the course of the construction of the rail-

road the channel of a natural stream was changed by the company so as to divide the water from the rest of the farm. For the damages occasioned by such diversion, M.'s action to recover was sustained. Neither the construction of a wagon-road over the land not taken nor the diversion of a natural stream from its course is a natural, necessary, or reasonable incident of the improvement. In *Pittsburgh etc. R'y Co. v. Gilleland*, 56 Pa. St. 445, and in *Southside R. R. Co. v. Daniel*, 20 Gratt. 849, the specific injuries complained of resulted from the failure to exercise proper care in the construction of the railroads; and in many of the other cases cited by counsel for appellee, the injuries for which a recovery was sustained clearly resulted from negligence in the construction of the improvement. On the contrary, it has been decided that the owner, for the purpose of determining the decrease in the value of the premises resulting from the improvement, is entitled to have the jury consider such remote contingencies as the liability to fires and to the frightening of horses from passing trains (Wisconsin); increased inconvenience in the use of the remainder, and annoyance likely to be caused by the smoke and noise of passing trains (New York); liability to loss of the use of a spring by having subterranean water channels cut off (New Hampshire); increased liability to overflow of water resulting from the construction of a canal (Maryland); and damages arising from seepage and leakage from a canal (New Jersey): *Blesch v. Chicago etc. R. R. Co.*, 48 Wis. 168; *In re Railroad Co.*, 56 Barb. 456; *Aldrich v. Cheshire R'y Co.*, 21 N. H. 359; 53 Am. Dec. 212; *Canal Co. v. Grove*, 11 Gill & J. 398; *Van Schoick v. Canal Co.*, *supra*. The decisions cited are valuable for the purpose of showing the extent to which the courts have gone in order that the entire damages may be assessed in one proceeding.

In assessing damages in condemnation proceedings for lands taken for the purpose of constructing a ditch or reservoir thereon, injuries likely to result from seepage and leakage from such canal or reservoir would naturally be among the first items to occur to a jury. And we are not without direct authority in support of the proposition that, if damages for such injuries are not allowed in the original action, no subsequent recovery for such injuries can be had. In the case of *Canal Co. v. Grove*, *supra*, the court held that, in estimating the value of the land taken for the use of the canal company, the jury of inquest should have allowed for the increased

danger of overflow to the lands not taken, and that the owner could not thereafter recover for damages arising from an overflow of his lands resulting from the construction of the canal, in the absence of negligence. In the New Jersey cases cited *supra*, under a statute requiring the jury in a condemnation proceeding "to assess the value of land and the damages sustained," the following questions were presented in a suit brought subsequent to the first assessment: "1. Whether the plaintiff was entitled by law to have his damages assessed by the former jury for the injury to his crops and land from leakage of the canal, for the loss of his road and the carrying away his soil by the reflow of the waters occasioned by the canal embankment. 2. If he was entitled by law to have his damages so assessed, whether, if he omitted to claim or prove such damages before that jury, or was prevented from doing so by the court, he can maintain another and distinct action for their recovery." It will be seen by these questions that the facts were very similar to those here presented, and in that case the court said: "I believe that the legislature intended that the award of the commissioners, or in case that should be set aside, the verdict of the jury, followed by the judgment of the court, should be final and conclusive between the parties, both as to the value of the land and the damages sustained. And I do not believe that they ever designed that, after such proceedings, the company could be subjected, from time to time, during the whole period of its existence, to an action at law by every land-holder on the line of the canal, to recover damages for some injury which he may allege was not foreseen, and for which subsequently he was not compensated. Such a construction would have been a most effectual bar to the enterprise of erecting a canal; for no man would have embarked his capital in a work the cost of which could never be ascertained till the charter expired. It may be said that it operates injuriously to an owner who sustains damages from a cause which neither the commissioners nor jury by the utmost human sagacity could see or provide against; but the defendants might urge the same objection, that they were liable to be assessed for anticipated injuries which may never occur. Entertaining this view of the question, I . . . am of opinion that the plaintiff was legally entitled to an assessment by the commissioners and former jury for all the injuries which are the subject of complaint in this action. This

brings me to the second question,—whether, having omitted to do so, or having been prevented by the court from doing so, he can now maintain this action. Believing that the statute provided a remedy for the injuries complained of in this action, I consider the plaintiff as confined to that mode of relief, and barred from an action at common law. It is no answer to say that he was deprived of his remedy under the statute by the act of the court. If the court committed an error, the plaintiff should have sought to have it corrected by a motion for a new trial.”

It is said that the rule requiring injuries resulting from seepage and leakage to be anticipated and damages for the same allowed in the condemnation proceedings will work hardship in some cases; but, while this is doubtless true, it is believed that mischief is less likely to result under such a rule than from any decision under which the owner of the improvement might be subjected to repeated suits for injuries, which the owner of the land might think were occasioned by seepage which was unforeseen at the time of the condemnation proceedings; and I am of the opinion that it is much wiser in the case at bar and similar cases to say that such injuries should be included in the original assessment. It follows that appellee should have been limited in his recovery to such injuries as resulted from negligence or want of care in the construction of appellant's ditch and reservoir, or in the subsequent use of the same; and it was error to permit the jury to consider and allow damages for seepage and leakage not resulting from such negligence or want of care.

The remaining questions raised by the assignment of errors are not such as are likely to arise upon a retrial of the case; and I shall not consider the same further than to say upon the question of damages that, as to trespasses and nuisances that are not of a permanent character, damages can only be recovered for the injury sustained up to the time of the commencement of the suit, but as to trespasses and nuisances that are of a permanent character, a single recovery may be had for the whole damage resulting from the act: *City of Denver v. Bayer*, 7 Col. 127. If these general rules are observed, I do not apprehend that any difficulty will arise upon this question upon a retrial of the case. The judgment must be reversed, and the cause remanded.

Reversed.

ELLIOTT, J., dissented from the foregoing opinion. He agreed that the judgment of the county court referred to in the principal opinion was originally void, but that the parties thereto, by accepting and acting upon the judgment, had made it valid as between them. He insisted, however, that this action of the parties must be given another effect than if it had been the result of a private negotiation by which one had agreed to pay and the other to receive the sum which had been fixed by the judgment; that the judgment would not, as the result of such agreement, be given all the effects and incidents of a valid judgment; that the real matter for consideration was the implied agreement of the parties, and he was satisfied, from the evidence, that in this implied agreement were not included the damages which afterwards resulted from leakage and seepage, and he therefore thought that these damages might still be recovered in the present action.

JUDGMENTS, CONCLUSIVENESS OF. — A judgment is conclusive of all questions within the issue, whether formally litigated or not: *Harmon v. Auditor of Public Accounts*, 123 Ill. 122; 5 Am. St. Rep. 502; *Bell v. Merrifield*, 109 N. Y. 202; 4 Am. St. Rep. 436, and cases collected in note 444; extended note to *DeVoos v. Richmond*, 98 Am. Dec. 681 et seq.; *Gates v. Hayner*, 22 Fla. 325; *Wright v. Anderson*, 117 Ind. 349. Judgment upon a point in a former suit is conclusive upon the same point in a subsequent suit: *Shumate v. Supervisors etc.*, 84 Va. 574; *Corprew v. Corprew*, 84 Id. 599; *Schroers v. Fisk*, 10 Col. 599. Taking an appeal from a judgment does not affect it as *res judicata*, and until it is reversed, it is binding upon the parties upon every question directly decided: *Day v. Holland*, 15 Or. 484.

ESTOPPEL. — Acceptance of the proceeds of a judicial sale estops one from questioning the validity of such sale: *Woodstock Iron Co. v. Fullenwider*, 87 Ala. 584; *ante*, p. 73, and note.

CONDEMNATION PROCEEDINGS — DAMAGES. — As to the rule of damages in condemning private land for railway purposes, see *Wabash etc. R'y Co. v. McDougall*, 126 Ill. 111; 9 Am. St. Rep. 539, and note 546, 547; extended note to *Sheehy v. Kansas City Cable R'y Co.*, 4 Id. 399-405.

EMINENT DOMAIN — DAMAGES FOR CONDEMNED REALTY. — The inquiry as to damages in a condemnation proceeding should not be confined to the land actually sought to be taken, but the damages to the entire tract caused by the taking a portion of it should be considered: *Kansas City etc. R. R. Co. v. Story*, 96 Mo. 611; *Cedar Rapids etc. R'y Co. v. Ryan*, 37 Minn. 38; *Cedar Rapids etc. R'y Co. v. Kelly*, 36 Id. 546; *Peck v. Superior Short Line R'y Co.*, 36 Id. 343; compare *Bell v. Chicago etc. R'y Co.*, 74 Iowa, 343. The land-owner will be entitled to the value of the land actually taken without regard to any set-offs against his damages in the way of benefits accruing to the land of the plaintiff: *Harwood v. City of Bloomington*, 124 Ill. 48; *Ball v. Keokuk etc. R'y Co.*, 74 Iowa, 132; compare *Moran v. Ross*, 79 Cal. 549. As to indirect and consequential damages, see *Railroad Co. v. Larson*, 40 Kan. 301; *Railway Co. v. Gardner*, 45 Ohio St. 309; *Shealy v. Chicago etc. R. R. Co.*, 72 Wis. 471; *Esch v. Chicago etc. R'y Co.*, 72 Id. 229. Elements to be considered in assessing damages in condemnation proceedings: See *Kiernan v. Chicago etc. R'y Co.*, 123 Ill. 188; *Atchison etc. R. R. Co. v. Schneider*, 127 Id. 144; *In the Matter of Opening First Street*, 66 Mich. 43; compare *Wier v. St. Louis etc. R. R. Co.*, 40 Kan. 130.

NUISANCES AND TRESPASSES — WHAT DAMAGES MAY BE RECOVERED: See note to *Cooke v. England*, 92 Am. Dec. 628, 630, 631. Recovering damages, for wrongs occasioned by a nuisance, that have accrued up to the date of

bringing the action therefor, does not bar a subsequent action brought for damages occasioned by a continuance of the nuisance: *Harmon v. Railroad*, 87 Tenn. 614. Where defendant, by repeated trespasses, pulls down plaintiff's fence, and as a result his crops are destroyed, the measure of damages is both the expense of replacing the fence and the value of the crops destroyed: *Bridgers v. Dill*, 97 N. C. 222.

DENVER, SOUTH PARK, AND PACIFIC RAILROAD COMPANY v. DRISCOLL.

[12 COLORADO, 520.]

JURY TRIAL. — A CHALLENGE FOR CAUSE IS PROPERLY SUSTAINED where, in an action against a railroad company, a juror answers that he has had some special accommodations from the defendant, expects to continue business over its road, and that that fact might possibly affect his verdict, and that if the case should be evenly balanced, he would give the benefit of the doubt to the company.

FELLOW-SERVANTS. — ONE IS NOT A FELLOW-SERVANT with men under his charge where he is superintending the work, has two foremen, and a number of men under him, whom he employs and discharges at pleasure, and has control of the cars, tools, and machinery. His employers are therefore answerable for his negligence in giving an order for the removal of a stick or brake, whereby a car on which men were riding became unmanageable and ran against another car and wounded the plaintiff.

EMPLOYERS ARE ANSWERABLE TO UNDER-SERVANTS for the negligence of superintendents and representatives acting within the scope of their employment, and who are given the control and management of a distinct department in which their duty is entirely that of direction and superintendence.

ACTION by Driscoll for personal injuries received by him while in the employ of the railroad company. The company was extending its line of road, and it placed one Manly in full charge of the track-laying. He employed the plaintiff, who was under his direction and control at the time of the accident. The plaintiff, with others, was riding upon a small flat-car without brakes. A stick was run through a hole in the bottom of the car and placed against one of the wheels to act as a brake to check the speed of the car while going down grade. This device answered the purpose for which it was intended, but Manly ordered the person who was applying the stick to take it off, and the order not being at once obeyed, Manly peremptorily directed the brake to be taken off, and the car to be let go. The last order was obeyed, and in a few seconds afterwards the speed of the car was so increased that it became uncontrollable, and ran into another car, killing one

man and wounding plaintiff and others. On the examination of the juror Altman, upon his *voire dire*, he answered that he had some business dealings with the defendant, had received some special accommodations in the way of commercial rates for traveling, and sometimes received favors in shipping goods over the road; that he expected to continue business and ship goods over the road, and that this fact might have a little influence with him, and might possibly affect his verdict; and that if the case should be evenly balanced, he would give the benefit of the doubt to the railroad company. The plaintiff thereupon challenged the juror for cause, the challenge was sustained by the court, and the juror excused. Verdict and judgment in favor of the plaintiff for fifteen hundred dollars, and thereupon the defendant appealed.

Teller and Orahood, for the appellant.

Joseph C. Murphey, for the appellee.

HAYT, J. 1. The first assignment of error relates to the ruling of the court in sustaining appellee's challenge for cause to M. D. Altman, one of the jurors called in the case. It is contended upon the part of the appellant that as the appellee was bound to maintain the issues in the case upon the trial by a preponderance of the evidence, the answers of the juror only amounted to a statement of that which he would be bound to do under the law, and therefore constituted no cause for challenge. We do not agree with counsel upon this proposition, as from the answers it seems that it was as a favor to the company that he would give it the benefit of a doubt under certain circumstances, and not because the burden of proof was upon the appellee. We think the answers of Mr. Altman were such as to justify the court in sustaining plaintiff's challenge to him; but aside from this, when a full examination of a juror leaves the question of his competency doubtful, we should hesitate to interfere with the ruling of the trial court thereon: *Grady v. Early*, 18 Cal. 111.

2. It is contended for appellant that the evidence was insufficient to warrant a submission of the case to the jury, and insufficient to sustain the verdict; also, that the complaint is insufficient to sustain the judgment thereon; that Manly and appellee were fellow-servants, engaged in the same line of duty or service; and that appellee cannot recover for injuries resulting from the negligence of his fellow-servant.

There is much conflict in the authorities as to who are to be held as fellow-servants engaged in the common employment, so as to preclude a recovery by one upon the negligence of the other, and it would be extremely difficult to lay down a general rule applicable to all cases; but we are of the opinion that there is sufficient alleged in the complaint and shown at the trial to warrant the jury in finding that Manly's relations to the company were such as to make it responsible for the acts of which complaint is made. He was superintendent of the work, and had two foremen and quite a number of men under him, whom he employed and discharged at his pleasure, having such authority in the premises. He had control of the cars, tools, machinery, and men there employed. The car upon which appellee was riding at the time of the accident was used for hauling the iron rails, and for hauling the men to the boarding-house or camp. It is also shown that under Manly's directions the men put the tools on this car, and with Manly, and under his directions, the men got upon it to go down the track to the boarding-place, about a mile distant, for the purpose of putting away the tools before quitting work for the night; that after the car was started, Manly directed the man at the brake to check the car up at one point where there were some mules near the track, which order was obeyed. After passing the mules, Manly then ordered that the stick or brake be taken off entirely, and that the car be let run; that this order was given the second time, when the man controlling the said brake obeyed the order, and the car was accordingly allowed to go, its speed rapidly increasing, so that it was soon beyond control, and, rounding a curve, it ran with great force against a car on the track loaded with iron, injuring appellee; that said loaded car was placed upon the track by order of Manly, without the knowledge of the appellee.

The jury found that the injury was directly attributable to the negligence of Manly; and in no proper sense of the term was he a fellow-servant with appellee. The company had placed him in charge of the work, with full discretion to control and supervise it, and he must be treated in reference to this work as its representative,—as vice-principal. The company is answerable to all the under-servants for the negligences of such a representative while acting within the scope of his employment: *Shearman and Redfield on Negligence*, sec. 102; *Wharton on Negligence*, sec. 229. In *Chicago etc. R. R. Co. v. Ross*, 112 U. S. 390, it is said: "There is, in our judgment, a

clear distinction to be made, in their relation to their common principal, between servants of a corporation exercising no supervision over others engaged with them in the same employment and agents of the corporation clothed with the control and management of a distinct department in which their duty is entirely that of direction and superintendence. A conductor having the entire control and management of a railway train occupies a very different position from the brakemen, the porters, and other subordinates employed. He is in fact, and should be treated as, the personal representative of the corporation, for whose negligence it is responsible to subordinate servants."

In Kentucky, Ohio, California, and other states, the distinction made in the case from which we have quoted has been recognized; and this distinction has been repeatedly pointed out by the decisions of this court, although the question here determined has not heretofore in this state been directly adjudicated: *Little Miami R. R. Co. v. Stevens*, 20 Ohio, 415; *Railroad Co. v. Collins*, 2 Duvall, 114; *Brown v. Sennett*, 68 Cal. 225; 58 Am. Rep. 8; *Wright v. Railroad Co.*, 28 Barb. 80; *Summerhays v. Kansas Pac. R. R. Co.*, 2 Col. 484; *Colorado Cent. R. R. Co. v. Ogden*, 3 Id. 499. We shall not attempt to review the decisions to the contrary. They are carefully reviewed in the case of *Railroad Co. v. Ross*, *supra*, and declared against in the opinion in that case. We think the allegations of the complaint were sufficient, and that the evidence in support thereof was sufficient to warrant the submission of the case to the jury.

8. It is claimed that there was no evidence to sustain the finding that appellee was engaged in the employ of appellant at the time he received the injuries.

The plaintiff testified that he was then working for the South Park Railroad Company, and several of those working with the plaintiff at the time testified that they were all, including the plaintiff, working for the South Park company, and were paid by the South Park company. This evidence is sufficient to support the finding, although no witness used the technical name given the defendant in its articles of incorporation: *Smith v. Cisson*, 1 Col. 29.

The judgment affirmed. —

MASTER AND SERVANT. — Who are fellow-servants: See *Peterson v. Chicago etc. R'y Co.*, 67 Mich. 102; 11 Am. St. Rep. 564, and cases collected in notes 569, 570. A station-agent and a brakeman employed by the same rail-

road company are fellow-servants: *Gaffney v. New York etc. R. R. Co.*, 15 R. I. 456; *Toner v. Chicago etc. Ry Co.*, 69 Wis. 188. A mate of a vessel and a common seaman upon the same vessel are fellow-servants: *Benson v. Goodwin*, 147 Mass. 237. A laborer employed to remove snow from a railroad track is a fellow-servant with a track-walker and a train-conductor: *Fagundes v. Central P. R. R. Co.*, 79 Cal. 97; compare *Casey v. Louisville etc. R. R. Co.*, 84 Ky. 79.

MASTER AND SERVANT. — The master is not liable for injuries sustained by an employee occasioned by the negligence of a fellow-servant: *Toner v. Chicago etc. Ry Co.*, 69 Wis. 188; *Benson v. Goodwin*, 147 Mass. 237; *Fagundes v. Central P. R. R. Co.*, 79 Cal. 97; *Casey v. Louisville etc. R. R. Co.*, 84 Ky. 79; compare *East Tennessee etc. R. R. Co. v. Collins*, 85 Tenn. 227.

MASTER AND SERVANT. — **MASTER'S LIABILITY FOR INJURIES TO SERVANT** by negligence of other servants: See note to *Peterson v. Chicago etc. Ry Co.*, 11 Am. St. Rep. 570; *Slater v. Chapman*, 67 Mich. 523; 11 Am. St. Rep. 593, and note 593.

GERMAN NATIONAL BANK OF DENVER v. BURNS.

[12 COLORADO, 389.]

BANK UNDERTAKING TO COLLECT A CERTIFICATE OF DEPOSIT is bound to use all reasonable diligence to protect the interest thus confided to its care.

A BANK BECOMES UNCONDITIONALLY LIABLE FOR THE AMOUNT OF THE CERTIFICATE OF DEPOSIT GIVEN TO IT FOR COLLECTION if it forwards such certificate to the bank by which it was issued, with the request to be credited with the amount thereof, if the certificate is received by the latter bank before it has suspended.

BANK WHICH DOES NOT EMPLOY A SUITABLE AGENT TO MAKE A COLLECTION is answerable for his misconduct or negligence when such agent is the party or bank whose duty it is to make the payment.

A BANK IS NEGLIGENT WHEN IT SENDS A CERTIFICATE OF DEPOSIT BY MAIL FOR PAYMENT TO THE BANK WHOSE DUTY IT IS TO MAKE SUCH PAYMENT, and it is therefore answerable for any damages resulting to its employer from such neglect.

EVIDENCE. — **DEPOSIT OF LETTER IN A POST-OFFICE, PROPERLY ADDRESSED AND STAMPED, IS PRIMA FACIE EVIDENCE ONLY** that the same was received in the ordinary course by mail by the person to whom it was addressed.

ACTION by Charles Burns, based upon the following facts: The plaintiff, in January, 1884, deposited with the First National Bank of Leadville three thousand three hundred dollars, and received therefor its certificate of deposit payable to him on his order upon return of such certificate properly indorsed. He at that time had an account with defendant herein, and he sent the certificate to defendant inclosed in the letter, in which the defendant was requested to credit his account with the amount of the certificate. The defendant replied by letter as follows: "German National Bank, Denver,

Col., January 17, 1884. Charles Burns, Esq., Leadville. Dear Sir: Your favor of the fifteenth received, with inclosures as stated. You have credit —. Yours truly, W. I. Jenkins, Cashier. I inclose —." The letter was written on a printed form. If the collection had been actually made, the blanks in such form should have been filled up by inserting the amount collected. The certificate of deposit was by defendant inclosed in a letter addressed to the First National Bank, or the president thereof, duly stamped, with notice printed on the envelope to return the letter in five days to the defendant if not called for. This letter was as follows: "The German National Bank, Denver, Col., January 17, 1884. F. W. De Walt, Esq., President, Leadville. I inclose for collection and credit No. 51,262, Rice; protest, \$800.63; you no protest, \$3,300; you no protest, \$3,092. Yours truly, W. I. Jenkins, Cashier." No response having been made to this letter, the defendant, on January 21st, sent an inquiry by telegram, and received on the same day an answer that no such remittance had been received. Thereupon the defendant reported the same to plaintiff by letter addressed to him at Leadville, directing him to go to the Leadville bank and get a duplicate certificate. On January 22, 1884, and before the plaintiff received this letter, the Leadville bank failed. Its president was afterwards convicted and sentenced to the penitentiary for unlawful acts in connection with its management. From the evidence of the receiver and teller of the bank, taken at the trial of this action, it appeared that they had no knowledge of the certificate, nor of the two items sent with it; that the books of the bank did not show any payment thereof. There were two mails per day from Denver to Leadville, arriving at Leadville about twelve hours after leaving Denver, and there were ample funds on hand in the Leadville bank up to January 22, 1884, for the payment of the certificate, and it would have been paid had the certificate been presented and payment demanded at any time prior to that day. The amended complaint in this action consists of two counts; the first of which was drawn upon the theory that the defendant had accepted the certificate as a deposit in favor of the plaintiff, and was bound to give him unconditional credit therefor, and the second on the theory that the defendant had received the certificate for collection, and had lost its proceeds through negligence and want of care. Plaintiff recovered judgment, and defendant appealed.

Patterson and Thomas, for the appellant.

L. C. Rockwell, for the appellee.

ELLIOTT, J. The plaintiff, by letter, had requested defendant to credit his account with the amount of the certificate of deposit inclosed. The reply to this letter by its literal terms indicated compliance with this request, but the credit was not actually given; and the trial court held that the evidence under the circumstances did not warrant the plaintiff's claim to such unconditional credit, so the first cause of action was dismissed. The trial court seemed to consider plaintiff's letter transmitting the certificate of deposit as equivalent to a request from plaintiff to collect of the Leadville bank, and to credit plaintiff with the proceeds of the collection. This view was certainly favorable to defendant. Under such circumstances defendant was bound to use all reasonable diligence to protect the interests of plaintiff. Its duty was to send the certificate in due season to be promptly presented for payment. If there was negligence on the part of defendant in this behalf, and loss resulted to plaintiff in consequence thereof, plaintiff undoubtedly has a cause of action against defendant for such loss: *Morse on Banks and Banking*, 354.

Thus far the authorities are agreed; but in some respects they are in conflict upon this subject. Some courts have held that a bank undertaking the collection of commercial paper is responsible, not only for any loss occasioned by the negligence of its own immediate servants and agents, but also for the neglect or default of any intermediate agent or correspondent to whom it intrusts such paper for collection in the regular course of business; and that this responsibility continues notwithstanding the collecting bank has exercised all reasonable care and diligence in the selection of such intermediate agents. Other decisions are to the effect that this responsibility extends only to collections to be made in the same place where the collecting bank is located, and that in case of a collection at a distant point, the bank discharges its duty by sending the paper in due season to a competent and reliable agent, with proper instructions.

Again, a distinction is made between an undertaking to collect commercial paper and an undertaking to transmit the same for collection. In the former case, the undertaking extends through the whole course of proceedings, and includes all the steps necessary or incidental to the accomplishment of

the object to be performed, and the collecting bank is held to answer for every neglect or default in the performance of its contract whereby its customer suffers loss, whether the negligence be that of its own immediate officers or agents or any subagent of its own selection; in the latter case, the undertaking is to use all reasonable diligence in the selection of the agent to whom the paper is thus transmitted: 1 Daniel on Negotiable Instruments, secs. 341 et seq.; *Exch. Nat. Bank v. Third Nat. Bank*, 112 U. S. 276.

Counsel, with much research and learning, have discussed at length these apparently conflicting decisions, and yet we do not find it necessary, in the determination of this case, to attempt to harmonize, distinguish, or select from among them with the view to declare the rule in this state in respect thereto. In this case, defendant sent the certificate of deposit by mail direct to the maker thereof,—to the bank issuing the same. Whether the letter of transmittal is to be regarded as an instruction to credit defendant with the amount of the certificate at the Leadville bank, or to remit to defendant the amount thereof, the risk was the same. Literally, the three letters above given, and the telegraphic reply by the Leadville bank above quoted, would seem to indicate that the forwarding of the certificate might have been intended as a “remittance” by defendant for “credit” on its own account at the Leadville bank, instead of a request to pay and return the proceeds. If such was the intent of defendant by the course pursued, it would have been unconditionally liable to plaintiff if the certificate was received by the Leadville bank before its suspension: *Morse on Banks and Banking*, 364; *Taber v. Perrot*, 2 Gall. 565.

But we need not rely upon this construction of the correspondence; for, whether we regard the sending of the certificate to the Leadville bank as the selection of such bank as agent for the collection of the paper, or as a direct presentation of the paper for payment, as defendant's counsel contend, the danger of such course was the same in either case. Even if we can conceive of such an anomaly as one bank acting as the agent of another to make a collection against itself, it must be apparent that the selection of such an agent is not sanctioned by business-like prudence and discretion. How can the debtor be the proper agent of the creditor in the very matter of collecting the debt? His interests are all adverse to those of his principal. If the debtor is embarrassed, there

is the temptation to delay; if wanting in integrity, there is the opportunity to destroy and deny the evidence of the indebtedness. The fact that the Leadville bank was a correspondent of the defendant to a limited extent does not alter the rule. Suppose an attorney receiving a promissory note for collection, executed by another attorney resident in a distant city, should send such note direct to the maker, asking him to undertake the collection thereof, and that, in consequence of such course, the collection should be lost, would it be any legal answer to his client for the first attorney to claim that the second attorney was his correspondent, to whom he had frequently sent collections, and that he was an attorney of good reputation and standing, financially and otherwise? As a matter of law, such method of doing business cannot be upheld. It violates every rule of diligence. Even if we were to follow the rule that the collecting bank could relieve itself from liability by sending the paper, in due season, to a suitable agent, with proper instructions, we feel constrained to hold, in the language of Mr. Justice Allison, of the court of common pleas of Philadelphia, concurred in by the supreme courts of Pennsylvania and of Illinois, "that such suitable agent must, from the nature of the case, be some one other than the party who is to make the payment": *Merchants' Nat. Bank v. Goodman*, 109 Pa. St. 428; 58 Am. Rep. 728; *Drovers' Bank v. Angelo etc. Provision Co.*, 117 Ill. 100; 57 Am. Rep. 855.

Counsel for appellant cite two cases as bearing directly upon the question under consideration: *People v. Merchants' etc. Bank*, 78 N. Y. 269; 34 Am. Rep. 532; and *Indig v. Nat. City Bank*, 80 N. Y. 100. Upon a careful examination, it will be found that in neither case was the bank to which the paper was sent the maker of such paper, nor primarily liable thereon. In each case, the party to make the payment was a customer or depositor merely of the bank to which the paper was sent.

Again, the sending of the certificate by mail direct to the Leadville bank for payment is not equivalent to a direct presentation thereof at the counter by a party not identified in interest with the bank itself. In presenting a check or certificate of deposit at the counter in legal contemplation, the holder does not give up the paper except as he then and there receives payment in hand. The surrender of the paper and the receipt of payment are regarded in law as simultane-

ous. Would it be considered diligent or prudent for an agent undertaking to collect negotiable paper to leave the paper at the counter with the president or cashier of the bank primarily liable to pay the same, and go away without receiving payment, merely directing a remittance of payment by mail or otherwise? We think not; and yet the opportunity for successfully evading or delaying payment in such a case would not be as great as in sending the paper direct to the bank by mail, expecting remittance by mail. The evidence fully shows that if defendant had selected some reliable third party to present the certificate to the Leadville bank for payment in the usual manner of transacting such business at any time before January 22, 1884, the same would have been paid. Under the circumstances, we think there was no error in taking the question of negligence from the jury.

The question remaining to be considered is, Was the negligence of defendant in sending the certificate direct to the Leadville bank the proximate cause of plaintiff's loss? The trial court submitted this as a question of fact to the jury substantially as follows: Was the certificate of deposit received by the Leadville bank at a time when such bank had sufficient funds to pay the same? The jury were instructed to the effect that if this question should be determined in the affirmative, plaintiff was entitled to recover; otherwise, not. The jury were further instructed that the burden of proving this issue was upon the plaintiff; that the depositing of the letter in the post-office, properly addressed and stamped, was *prima facie* evidence only that the same was received in the ordinary course of the mails by the Leadville bank; and that the other evidence and circumstances of the case must be considered in determining whether or not the letter was so received. We see no error in the submission of the case to the jury in this manner; the instructions given were as favorable to defendant as the law required; and the prayers for instructions by defendant were either erroneous or unnecessary: 1 Greenl. Ev., sec. 40; *Huntley v. Whittier*, 105 Mass. 391; 7 Am. Rep. 536; *Wall's Case*, 5 Moak, 686.

The trial court decided in effect, though not in words, that defendant acted at its peril in sending the certificate of deposit by mail direct to the bank primarily liable thereon for payment; in other words, that such a course was negligence *per se*. Whether such negligence was the proximate cause of plaintiff's loss depended upon whether the certificate was re-

ceived by the Leadville bank at a time when the bank was paying such paper on presentation at its counter in the regular course of business. There was no conflict as to the time when the bank suspended payment. Whether the letter reached there before the time of such suspension was the one doubtful question of fact in the case. It cannot be said there was no evidence upon this question, for competent testimony from several witnesses was introduced, though the defaulting president's testimony was not secured. The weight of this testimony was for the jury; and the jury was the proper tribunal to resolve the doubt and determine the question. This question of fact having been determined in favor of plaintiff, and the record being free from substantial error of law, the court cannot properly disturb the verdict. The judgment of the superior court is accordingly affirmed.

PRESUMPTIVE EVIDENCE — MAILING LETTERS. — A letter will not be presumed to have reached the person to whom it was addressed at any time earlier than it is actually shown to have been in his possession, when it was addressed to him at a place other than his regular post-office address: *Phelan v. Northwestern etc. Ins. Co.*, 113 N. Y. 147; 10 Am. St. Rep. 441, and note 444, as to the presumption of a properly addressed and mailed letter reaching its destination.

BANKS — COLLECTIONS BY. — Banks are ordinarily only liable for their own negligence in making collections for their customers: *Ayrault v. Pacific Bank*, 47 N. Y. 570; 7 Am. Rep. 489, and note; *Georgia Nat. Bank v. Henderson*, 46 Ga. 487; 12 Am. Rep. 590; *Briggs v. Central Nat. Bank*, 89 N. Y. 182; 42 Am. Rep. 285; *Bank of Del. Co. v. Broomhall*, 38 Pa. St. 135; 80 Am. Dec. 471; *Ivory v. Bank of the State of Missouri*, 36 Mo. 475; 88 Am. Dec. 150; *Commercial Bank v. Hamer*, 7 How. (Miss.) 448; 40 Am. Dec. 80; *Fabens v. Mercantile Bank*, 23 Pick. 330; 34 Am. Dec. 59; *Miller v. Gettysburg Bank*, 8 Watts, 192; 34 Am. Dec. 449; *Armington v. Gas L. & B. Co.*, 15 La. 414; 3 Am. Dec. 206; *Tyson v. State Bank*, 6 Blackf. 235; 38 Am. Dec. 139; and are not liable for the negligence of their correspondent banks in other places, when such correspondents have been carefully selected: *Third Nat. Bank v. Vicksburg Bank*, 61 Miss. 112; 48 Am. Rep. 78; *Guelich v. National State Bank*, 56 Iowa, 434; 41 Am. Rep. 110; *Bank of Louisville v. First Nat. Bank*, 8 Baxt. 101; 35 Am. Rep. 691 (but see *Fabens v. Mercantile Bank*, 23 Pick. 330; 34 Am. Dec. 59; *Allen v. Merchants' Bank*, 22 Wend. 215; 34 Am. Dec. 289); nor for the negligence of notaries public: *Ottomson's Bank v. Howell*, 8 Md. 530; 63 Am. Dec. 714; *Tiernan v. Commercial Bank*, 7 How. (Miss.) 648; 40 Am. Dec. 83; *Hyde v. Planters' Bank*, 17 La. 560; 38 Am. Dec. 621; *Bellemire v. Bank of the United States*, 4 Whart. 106; 33 Am. Dec. 46; *Baldwin v. Bank of Louisiana*, 1 La. Ann. 13; 45 Am. Dec. 72; but see *Gerhardt v. Boatman's Sav. Inst.*, 38 Mo. 60, 90 Am. Dec. 407, *Allen v. Merchants' Bank*, 22 Wend. 215, 34 Am. Dec. 289, for circumstances under which a bank in making collections is responsible for the negligence of a notary public. Compare extended note to *Allen v. Merchants' Bank*, 34 Id. 307-317, for the liability of banks generally in making collections; also see *Fifth Nat. Bank v. Ashworth*, 123 Pa. St. 212.

BENESCH v. WAGGNER.

[13 COLORADO, 584.]

PLEADING—FRAUD, WHEN ADMISSIBLE IN AN ACTION OF REPLEVIN OR OF CLAIM AND DELIVERY. — In an action to recover possession of personal property, where the plaintiff alleges that he is the owner and entitled to the immediate possession thereof, and that it is unjustly detained by defendant, evidence is admissible to show that the property was obtained from the plaintiff by false and fraudulent representations, and that defendant is not a purchaser thereof for value and in good faith.

ESTOPPEL.—ONE WHO GIVES A FORTHCOMING BOND in an action of claim and delivery is estopped from denying that the property was in his possession at the commencement of the action.

FAILURE OF VENDOR TO RETURN MONEY RECEIVED BY HIM OF HIS VENDEE, who obtained possession of property by false and fraudulent representations, cannot be urged as a defense by a third person, whom such vendor sues to obtain possession of such property.

IMPEACHING A WITNESS. — The question asked one witness concerning another, "From what you know of his truth and veracity, would you believe him under oath?" is incompetent, as calling for the opinion of a witness based upon his personal knowledge, and not upon the general reputation of the witness sought to be impeached.

ACTION of claim and delivery brought by Waggoner against Benesch and others. At the trial evidence was offered, and against the objection of the defendants received, tending to show that the goods sued for were obtained from the plaintiff by false and fraudulent representations made by Charles Marzyck, and that the defendants who obtained possession of the goods from Marzyck were not *bona fide* purchasers. Judgment in favor of the plaintiff. The defendants appealed.

H. V. A. Ferguson, for the appellants.

R. D. Thompson, for the appellees.

HAYT, J. 1. The first assignment of error relates to the admission, against objection, of evidence tending to show that plaintiff was induced to part with the goods in the first instance by the fraudulent conduct of Marzyck, and also to the admission of evidence of the fraudulent nature of the subsequent transfer of said goods to the appellants by Marzyck; the claim advanced by appellants being that, as the complaint is in the ordinary form of complaints in replevin in the *detinet*, without any allegations of fraud, proof of fraud was not admissible under the pleadings.

The requisites of a complaint in actions for the claim and delivery of personal property under the code were considered

in *Baker v. Cordwell*, 6 Col. 200. It was there held that a complaint not containing an averment of ownership was insufficient in an action of replevin at common law, and that nothing short of the requirements of the common-law rule would meet the requirements of the code. Chief Justice Elbert, in the opinion, speaking of the action under the code, says: "There are no provisions of the statute which specially apply to this action anterior to filing the affidavit. The nature and character of the action are not defined, as in many states."

The code, however, provides that where a delivery of the property is claimed, an affidavit shall be made by the plaintiff, or some one for him, showing *inter alia* "the alleged cause of the detention thereof, according to his best knowledge, information, and belief." The complaint need not, however, allege everything required to be stated in the affidavit; and in the absence of legislation requiring it, we see no necessity for greater detail in the allegations of the complaint than under the former practice: *Bosse v. Thomas*, 3 Mo. App. 472. In the complaint before us it is alleged that the plaintiff is the owner of the goods, and entitled to the immediate possession of the same, and that the defendants unjustly detained said goods after demand. Under similar allegations it was expressly decided by this court in *Sopris v. Truax*, 1 Col. 89, that the testimony offered would have been competent under the practice as it existed prior to the adoption of the Civil Code, and there are many decisions to the same effect under the reformed procedure. In the case of *Hunter v. Hudson R. I. Machine Co.*, 20 Barb. 495, this precise question was before the supreme court of New York, and it was held in that case that in an action of claim and delivery the plaintiffs might declare generally, claiming the property as theirs, and give in evidence special facts to establish the fraud by which the defendant obtained possession of the goods. In *Bliss v. Cottle*, 32 Barb. 323, this decision was expressly affirmed, and to the same effect is the case of *Decker v. Mathews*, 12 N. Y. 313. The question was presented to the supreme court of California in the case of *Nudd v. Thompson*, 34 Cal. 39, in which case the plaintiffs declared generally, as in the case at bar, and in addition attempted to set up the facts showing the fraud, and the court said: "There can be no question, however, that the more general statement was sufficient for all the purposes of pleading, nor that a denial of it put the plaintiffs upon their proof as a prerequisite to judgment. The second or detailed

statement was but the first in minute analysis." Under the allegations of ownership and right of possession, we think the evidence objected to was properly admitted.

2. There was no error in not allowing the witness Benesch to testify that appellants never had a portion of the property claimed by appellee in their possession. The officer's return showed the number of bales of tobacco levied upon by him under the writ, and it was also shown that the defendants had, for the purpose of retaining possession of the property, given the statutory forthcoming bond. Under these circumstances they were estopped from denying that the property was in their possession at the commencement of the action, for it was only upon the assumption that the property was taken from their possession by the officer that they were entitled to demand its return upon giving the forthcoming bond; and after securing possession by this means, it was then too late for them to deny that the property was found in their possession at the time of the levy of the writ: *Diossy v. Morgan*, 74 N. Y. 11. Afterwards the court admitted evidence of the number of bales actually received by appellants, and the value thereof, and if the original ruling had been erroneous, this subsequent admission of the evidence would have cured the error.

3. It was shown upon the trial that bale No. 1,532 of the Sumatra tobacco was sold October 9, 1885, to Marzyck for the sum of \$279.35, of which amount the sum of \$139.67 had been paid by him. There was no return of this amount or of any portion of it to the vendee; and it is contended that appellee could not maintain the action while retaining a portion of the purchase price. This would have been a good defense if presented by Marzyck in a suit against him; for it is well settled that a vendor cannot rescind a sale and at the same time keep the purchase price in whole or part; but this rule does not apply when the suit is against a third party. Appellee was not bound to tender this money to these defendants, because he had not received it from them; and Marzyck, the only party having a right to complain, was not a party to the suit. It is *res inter alios*, with which these appellants have no concern, and they cannot raise the question as to whether or not appellee has made restoration to Marzyck. In the court below they were, however, allowed a credit for the amount received by appellee from Marzyck, and in no event were they entitled to more favorable treatment in reference to the matter than that accorded them, and consequently they cannot now

be heard to complain: *Pearse v. Pettis*, 47 Barb. 276; *Stevens v. Austin*, 1 Met. 558; Benjamin on Sales, sec. 442.

4. Upon the trial appellants attempted to impeach Ginzburger, one of the witnesses called by appellee; and for that purpose, after asking the usual preliminary questions of one of their witnesses, propounded this question: "From what you know of his truth and veracity, would you believe him under oath?" The question propounded was clearly incompetent, for the reason that it called for an opinion of the witness based upon his personal knowledge of Ginzburger, and not for an opinion based upon the general reputation for truth and veracity of the witness sought to be impeached, and the court committed no error in sustaining defendant's objection to the question.

5. It is claimed that the evidence is insufficient to support the judgment. The evidence strongly tended to show that the original sale to Marzyck was induced by fraudulent representations made by the vendee, and also that the subsequent transfer of said goods to the appellants was collusive and fraudulent; and under such circumstances we see no reason to disturb the judgment of the trial court: Wells on Replevin, sec. 318; *Hoffman v. Noble*, 6 Met. 73; 39 Am. Dec. 711; *Kline v. Baker*, 99 Mass. 253; *Barnard v. Campbell*, 65 Barb. 286; *Harner v. Fisher*, 58 Pa. St. 453; *Hunter v. Hudson R. I. Machine Co.*, 20 Barb. 495.

Judgment affirmed.

ESTOPPEL. — Giving a forthcoming bond by plaintiff estops him from showing that the sheriff never took possession of part of the property, and that defendant retained possession thereof: *Hills v. Nalms*, 86 Ala. 442. Compare *Roswald v. Hobbie*, 85 Id. 73; 7 Am. St. Rep. 23.

REPLEVIN — GOODS SOLD UPON FRAUDULENT REPRESENTATIONS OF PURCHASER. — A vendor may maintain replevin for goods which he has been induced to sell by fraud: *Sleeper v. Davis*, 64 N. H. 59; 10 Am. St. Rep. 377, and note 380, 381; *Benesch v. Weil*, 69 Md. 276; but before a seller can maintain replevin for goods which he was induced through fraud to sell, he must restore the purchase price, provided he has received it: *Thompson v. Peck*, 115 Ind. 512.

SALES — RIGHTS OF PURCHASERS FROM A FRAUDULENT VENDEE. — A *malafide* purchaser of goods from a fraudulent vendee cannot in an action of replevin hold the property as against the original vendor: *Sleeper v. Davis*, 64 N. H. 59; 10 Am. St. Rep. 377; *Manning v. Albee*, 14 Allen, 7; 92 Am. Dec. 736; *Farley v. Lincoln*, 51 N. H. 577; 12 Am. Rep. 182; *Brown v. Bank of Napa*, 77 Cal. 544; compare *Benesch v. Weil*, 69 Md. 276; *Henderson v. Gibbs*, 39 Kan. 679. Good faith, even, does not protect a purchaser of a chattel from one without title: *Church v. McKillop*, 17 Or. 413; and whenever one of two innocent parties must suffer by the acts of a third, the one who has

enabled such third party to occasion the loss must sustain it: *Sawyer v. Symas*, 39 Kan. 148.

WITNESSES, IMPEACHMENT OF, ON GROUND OF CHARACTER OR REPUTATION: See note to *Allen v. State*, 73 Am. Dec. 771-775; compare also *Spies v. People*, 122 Ill. 1; 3 Am. St. Rep. 320; *Griffin v. State*, 26 Tex. App. 157; 3 Am. St. Rep. 460, and note 462.

CHEEVER v. MINTON.

[12 COLORADO, 557.]

LES PENDENS. — A PURCHASER OF REALTY PENDENS LITE, whether the action be at law or in equity, takes subject to any title or interest adverse to that of his grantor ultimately recognized in the pending litigation.

LES PENDENS. — DURING THE INTERVAL BETWEEN FINAL JUDGMENT AND THE COMMENCEMENT OF PROCEEDINGS ON ERROR, there is no suit pending, and a purchaser in good faith does not take title *pendente lite*, and is not affected by a subsequent appeal or writ of error and the reversal of judgment thereon.

LES PENDENS. — NOTWITHSTANDING A STATUTE provides for a filing of notice of the pendency of an action, and "that from the time of filing such notice only shall the pendency of the action be constructive notice to a purchaser or encumbrancer from a party affected thereby," a purchaser of the property in controversy in such action is not affected by said notice unless his purchase is during the pendency of the action, and it is not during such pendency if final judgment has been entered therein, though such judgment is ultimately reversed on a writ of error subsequently sued out.

EJECTMENT by Cheever to recover possession of real property. The property in controversy had been the subject of a chancery suit in which a final decree had been entered in the year 1871, after which, the defendant, Mary A. Minton, purchased the property at private sale. After such purchase the decree was taken by writ of error to the supreme court and there reversed. The defendants had judgment in the court below. Plaintiff appealed.

Markham and Dillon, for the appellant.

Browne and Putnam, for the appellees.

HELM, C. J. The present appeal may, in our judgment, be determined by the discussion of a single abstract question of law, viz.: Is the title of a purchaser in good faith, which rests in whole or in part upon a voidable decree in chancery, the purchase being made after the entry thereof, and before a writ of error thereto is sued out, affected by a subsequent reversal of the decree on error?

The rule is well established that, in the absence of statute, a purchaser of realty *pendente lite*, whether the action be at law or in equity, takes subject to any title or interest adverse to that of his grantor ultimately recognized in the pending litigation: Freeman on Judgments, secs. 191-193; 1 Story's Eq. Jur., sec. 405; Wade on Notice, secs. 339, 340.

But confusion exists in the application of this general rule, owing to the fact that courts occasionally differ in determining whether or not a suit is actually pending at a given time. Thus the supreme court of Kentucky, in passing upon the precise question now under consideration, holds, that since the right to a writ of error exists by virtue of the statute, and the purchaser must be presumed to know the law, he takes subject to every possible effect which proceedings on error may have upon the title of his grantor. It is said that the statute which allows a certain time for suing out writs of error becomes a part of the decree itself, and thus qualifies or limits the title of those purchasing at private sale thereunder: *Clarey v. Marshall's Heirs*, 4 Dana, 95; *Debell v. Foxworthy*, 9 B. Mon. 228; *Earle v. Couch*, 3 Met. (Ky.) 450.

On the other hand, courts of no less dignity assert that the final decree, where no appeal is taken therefrom, is a final determination of the particular suit. Also, that subsequent proceedings by writ of error constitute a wholly new and independent action. Therefore they say, as we think correctly, that during the interval between final judgment and proceedings on error there is no suit pending, and a purchaser does not take title *pendente lite*. Hence, to such a purchaser, if his purchase be otherwise *bona fide*, the subsequent reversal or affirmance of the decree or judgment is a matter of no consequence: *Lessee of Taylor v. Boyd*, 3 Ohio, 337; 17 Am. Dec. 606; *McCormick v. McClure*, 6 Blackf. 466; 39 Am. Dec. 441; *Barlow v. Stanford*, 82 Ill. 298; *Wadhams v. Gay*, 73 Id. 415, and cases cited; *Eldridge v. Walker*, 80 Id. 270; *Heirs of Ludlow v. Kid*, 3 Ohio, 541.

The three decisions last above mentioned were rendered in causes where the decrees relied upon dismissed the respective bills, and adjudged the costs against complainants. Some writers undertake to distinguish between cases of this kind and cases where the action, whether at law or in equity, is tried on its merits, and a final decree or judgment is entered in favor of plaintiff, from whom the title in controversy is obtained by private purchase. It cannot be denied that plausi-

ble reasons are advanced in support of this distinction; but, in our judgment, the sounder view is otherwise. The distinction is inconsistent with the conclusion adhered to in this and other states, that the writ of error constitutes a new and independent suit. Moreover, the judgment or decree in one instance is as final and complete as in the other, and the writ of error lies to review each alike. Under these circumstances, it is certainly illogical to say that if the action be dismissed, the suit is no longer pending, though a writ of error subsequently issue; while, if judgment be entered on the merits, and afterwards the cause is reviewed upon error, an intermediate purchase is *pendente lite*.

Nor is the foregoing distinction, so far as we can discover, expressly made in any of the decisions we have cited. The cases in 82 Illinois, 6 Blackford, and 3 Ohio, 337, were decided with reference to adjudications on the merits, and not dismissals; and in the three remaining opinions, the matter is passed by unnoticed.

The successful party ought not to have his title clouded, and the value of his property correspondingly diminished, for three years by the two doubtful contingencies: 1. That a writ of error will be sued out; and 2. That a reversal or modification of the judgment will take place, should his opponent finally elect to bring such an action. It is no great hardship upon the losing party to say that he should speedily take steps to reverse the judgment if he intend to do so at all; and it is much more in consonance with equity to hold that if the judgment be not at once removed to the court of review, either by appeal or by error, such party will not be heard to complain if he loses the benefits of the review through the intervention of a *bona fide* purchase.

In so far as private purchasers prior to final judgment are concerned, the hardships produced by the common-law rule are now done away with. For several years past we have had a legislative provision which authorizes the filing with the clerk and recorder of a notice stating that a suit is pending involving title to the realty specified. The statute further provides that "from the time of filing such notice only shall the pendency of the action be constructive notice to a purchaser or encumbrancer of the property affected thereby": Sess. Laws 1887, p. 106, sec. 36. The specific question under consideration, however, is not affected by this statute, for the constructive notice to a purchaser or encumbrancer given by filing the

statutory statement can only be good while the suit referred to is pending, and whether or not, during the specified period allowed by statute for suing out a writ of error, the suit shall be treated as pending, is a question still left for the courts to answer.

The judgment of the district court is affirmed.

IN PENDENS. — As to the applicability of the doctrine of *in pendens*, see *Hays v. Newnes*, 114 N. Y. 595; 11 Am. St. Rep. 700, and note 707; *Heaton v. Timmerman*, 17 Or. 499; 11 Am. St. Rep. 848, and note 856. Where personally, pending litigation with respect thereto, is removed from the jurisdiction where the litigation is pending to another jurisdiction, and there sold to a bona fide purchaser, the doctrine of *in pendens* will not affect such sale: *Carr v. Lewis Coal Co.*, 96 Mo. 149. The pendency of another suit between the same parties, founded on the same cause of action, is not good matter for a plea in abatement, when the former proceeding is void on its face: *Ernst v. Hayes*, 86 Ala. 502. When, prior to a foreclosure sale, the principal commenced a suit to assert his rights, and filed notice of *in pendens*, such notice charged the purchasers at the foreclosure sale: *Randall v. Duff*, 79 Cal. 116.

CASES
IN THE
SUPREME COURT
OF
KANSAS.

STATE v. FURNEY.

(41 KANSAS, 115.)

CRIMINAL LAW. — FACT THAT INFORMATION CONTAINS SURPLUSAGE of redundant allegations will not warrant the court in quashing it, where there is specific matter alleged sufficient to clearly indicate the crime charged.

EVIDENCE — PRACTICE. — IT IS LARGELY IN DISCRETION OF TRIAL COURT TO PERMIT the preliminary proof to the introduction of death-bed statements of deceased to be given to the court in the presence of the jury. But good practice would require this evidence to be heard in the absence of the jury, if properly insisted upon.

CRIMINAL LAW — EVIDENCE. — TO ENTITLE STATEMENTS OF DECEASED, NOT MADE UNDER OATH, TO BE ADMITTED IN EVIDENCE as dying declarations, it must clearly be shown that such statements were made with a full knowledge and belief that death was imminent, and that the deceased with this knowledge, and without a hope or expectation of recovery, made the statements.

APPEAL AND ERROR — EVIDENCE. — ERROR IN PERMITTING INCOMPETENT TESTIMONY TO GO TO JURY is cured, where the defendants go upon the stand as witnesses on their own behalf, and there give substantially the same evidence as that erroneously admitted in the first instance.

CRIMINAL LAW — CONSPIRACY. — COMMON DESIGN. — Where persons combine to commit a crime, and while engaged in such unlawful act murder is committed by one of such conspirators, without the knowledge or consent of the others, and the act is not the natural and probable outcome of the common design, but the independent act of one conspirator alone, and outside of the common purpose, those not participating in it are not guilty of murder.

CRIMINAL LAW. — TO WARRANT CONVICTION WHERE STATE RELIES UPON A single chain of circumstantial evidence, each essential fact in the chain of circumstances must be found by the jury to be true beyond a reasonable doubt.

PROSECUTION for murder. William Furney, and two others, were charged with stabbing and killing one Calvin Cooper. They had a trial, and each was convicted of murder in the second degree, and was sentenced to imprisonment for ten years in the state penitentiary. They appealed.

Maloy and Kelly, and A. H. Case, for the appellants.

J. M. Miller, county attorney, and John T. Bradley, for the state.

CLOSTON, C. The first question raised is as to the sufficiency of the information. The motion to quash the same was overruled. We have carefully examined the information, and the objections urged against it, and are clearly of the opinion that the information contains a sufficient statement of facts to constitute the crime of murder. It is true, the information contains much that might have been stricken out, and it is open to the objection that it does not in plain and concise language, without repetition, set forth the charge; but this is not such a defect as will warrant the court in quashing the information, as surplusage or redundant allegations will not render the information bad where there is specific matter alleged sufficient to clearly indicate the crime with such certainty that the court could pronounce judgment upon a conviction. The motion to quash was properly overruled.

The second allegation of error is, that the court permitted the preliminary proof to the introduction of the death-bed statement of Calvin Cooper to be given to the court in the presence of the jury. The hearing of this evidence by the court in the presence of the jury was largely within the discretion of the court. Good practice would require that this evidence be heard, not in the presence of the jury; but in this case no motion to exclude the matter or to request that the jury be sent out was made, and therefore no error is alleged in the record.

The third assignment of error is, that it is not sufficiently shown by the testimony that Calvin Cooper realized that he was in a dying condition, or that death was certain as the result of the wound, at the time of making the written statement offered in evidence. Before the death-bed statement of the deceased could be used, it must be clearly shown that such statement was made with a full knowledge and belief that death was imminent, and that the deceased with this knowledge, without a hope or expectation of recovery, made

the statement: See *State v. Medlicott*, 9 Kan. 257. The evidence offered and received by the court, we think sufficient to entitle the statement of the deceased to be admitted in evidence. Four witnesses testified upon this question. Dr. D. H. Painter testified that on his second visit to the deceased he concluded that the wound was fatal, and he told Cooper so. This was on Sunday or Monday following the Thursday on which Cooper was injured. The doctor testified: "I told Cooper that I felt satisfied in my own mind that the injuries he had received were necessarily fatal, and that he would die as a result of them; that I could not do anything more for him." The doctor then testified that after this statement it was reduced to writing, and was signed by Cooper. The doctor also testified that Cooper told him that he knew he was going to die.

The next witness called to establish this fact was Robert Cooper, who also testified that he was present at the time the doctor told Cooper he was going to die. This witness was the uncle of Calvin Cooper, at whose house Calvin Cooper was living before and at the time of his death. He stated that the doctor told him (Cooper) that the wound would be fatal, and that he would die, and asked Cooper to make a statement of what took place at the time he received the injury. He said that at the time the doctor made this statement Cooper said he did not hardly think he was going to die, or something like that, or that he had not thought of dying at all. But after being informed by the doctor that he would die from the wound, and that if he had anything to fix up he had better fix it, the doctor asked him if he did not want to make a statement of what occurred at the school-house, and he said he did, and a short time afterward made the statement that was offered in evidence.

The third witness who testified was William Chitty, who said that he was present at the time Dr. Painter said to Cooper that if he had any worldly matters to fix up he had better fix them up right away, because he was likely to die at any time, or something to that effect. Witness testified he had a conversation with Cooper, in which Cooper told him he thought he was going to die, and that he was trying to keep it from the knowledge of his friends, and requested witness not to inform the family that he was going to die. Before making the statement he asked some one to come in and pray for him, and Mr. Simmons prayed for him; and Cooper then asked if there

was any one else in the house who would pray for him, and Chris. Anderson also prayed for him. He also stated, in response to a question asked by Mrs. Cooper, that he was prepared and ready to go at any time, speaking of his death.

The fourth witness was Samuel Rouse, who testified that he was present at the time Dr. Painter made the statement to Calvin Cooper. This witness also testified that the deceased had prayers offered for him, and that Simmons and Chris. Anderson, at his (Cooper's) request, prayed for him, and after these two had offered prayers, Cooper asked if there was any one else in the house to pray for him, and after this statement of Dr. Painter's to him, and the prayers offered, this statement was made that was offered in evidence.

Now, from this testimony, it can clearly be said that Calvin Cooper made this statement under the belief that he was about to die, and that all hope of recovery had fled. The rule contended for by the defendants is, that before this statement can be offered, all the testimony must show that the deceased knew he was going to die, and the fact that his uncle testified that Cooper said he did not think he was going to die, or had not expected to die, left the matter in doubt, and that if there was any doubt about it, it was the duty of the court to exclude the statement. In this we do not concur. It was a question of the admissibility of evidence, and was governed by the same rules that govern the admission of all other evidence. The question is, Was there sufficient evidence to sustain the ruling of the court? The court passed upon this question, and there is abundant evidence to sustain the ruling.

The next allegation of error urged by the defendants is, that the court permitted the statements of the defendants given at the coroner's inquest to be offered in evidence for the state, over the objections of the defendants. It is shown by the testimony of at least one of these defendants that they were duly subpoenaed to attend the inquest, and gave their testimony by reason of being subpoenaed as witnesses. At this time the defendants had not been arrested or accused of the crime, other than in the dying declarations of Calvin Cooper. To make this testimony competent as their declarations, they must have been made voluntarily: *Kirby v. State*, 23 Tex. App. 13. The question whether or not this evidence was voluntary in this particular instance, it is not necessary to determine. Whether it was or not, the evidence was made competent afterwards by the defendants. They went upon the stand as witnesses on

their own behalf, and there gave substantially the same evidence as that given at the coroner's inquest. If the testimony was incompetent in the first instance, which we are inclined to believe, the defendants, on cross-examination, substantially stated that the evidence given at the coroner's inquest was correct. It was in substance the same as that given by them at the trial. It then becomes immaterial whether or not the testimony offered as their declarations before the coroner's inquest was properly admitted.

The main objection urged by the defendants in their brief is to the instructions given by the court to the jury. A large number of the instructions are complained of, but we will examine only two, for the reason that they contain the only error that we have discovered sufficient to reverse the case. The first instruction complained of, which, upon examination, is found to be erroneous, is as follows: "If you believe, from the evidence in this case, beyond a reasonable doubt, that the defendants, or any of them, conspired and agreed together or with others to assault Calvin Cooper by force, or to unlawfully beat or wound him; and if you further believe, from the evidence, beyond a reasonable doubt, that in pursuance of such conspiracy, and in furtherance of such common design, a stab was inflicted on the body of the deceased by a member of such conspiracy at the time, and that Calvin Cooper was killed by such stab,—then such of the defendants as the jury believe, from the evidence, beyond a reasonable doubt, to have been parties to such conspiracy, are guilty of murder, whether the identity of the person inflicting such stab be established or not."

The objection to this instruction is, that the jury are told that if any of the defendants conspired together to assault Calvin Cooper by force, and in furtherance of that common design a stab was inflicted upon the body of the deceased by a member of the conspiracy, and Calvin Cooper was killed by that stab, then all connected with that conspiracy were guilty of murder. This is not the law. If the court had added to this instruction that if the defendants, or any of them, conspired and agreed to assault and stab Calvin Cooper, and in furtherance of that common design a stab was given from which Cooper died, that all who participated in the conspiracy were guilty of murder, the instruction would have been correct. The court in this instruction charges as to two kinds of conspiracy: 1. A conspiracy to assault by force; and 2. To

unlawfully beat and wound. The first of these—to assault with force—would constitute a misdemeanor; and where an assault or an assault and battery is committed under an arrangement between defendants or with others, and death results from such assault, where there is no intention to kill, and such results could not have been anticipated or likely to happen therefrom under such circumstances, the defendants would be liable for manslaughter, and not for murder: *Brown v. State*, 28 Ga. 199; *Rex v. Caton*, 12 Cox C. C. 624; *United States v. Hibert*, 2 Sum. 19; *Frank v. State*, 27 Ala. 37; *Adams v. State*, 65 Ind. 574; *State v. Shelledy*, 8 Iowa, 477.

Again, where parties combine to commit a crime, and while engaged in such unlawful act murder is committed by one of such conspirators, without the knowledge or consent of the others, and the act is not the natural and probable outcome of the common design, but the independent act of one conspirator alone, and outside of the common purpose, those not participating in it are not guilty of murder: See *Lusk v. State*, 64 Miss. 845; *Kirby v. State*, 23 Tex. App. 13; *Williams v. State*, 83 Ala. 16; *Spies v. People*, 122 Ill. 1; 3 Am. St. Rep. 320. While on the other hand, if they conspire together, or with others, to assault, beat, and stab, then all who participated in the conspiracy would be guilty of murder. The court ought to have made this matter clear to the jury, and they ought to have been instructed that it was necessary to show the conspiracy to wound or stab, and that the stab or wound from which Cooper died was the result of that conspiracy.

The second instruction complained of is as follows: "The rule requiring you to be satisfied beyond a reasonable doubt of the guilt of the defendants in order to warrant a conviction does not require you to be satisfied beyond a reasonable doubt of each link in the chain of circumstances relied upon to establish the guilt of the defendants. It is sufficient if, taking the testimony altogether, you are satisfied beyond reasonable doubt that defendants are guilty."

Before a defendant can be convicted, every fact essential to the conviction must be found by the jury, beyond a reasonable doubt, to be true. Now, doubtless, what the court intended to charge in this instruction was, that in the different facts that go to make up a chain of circumstances, each individual fact that constitutes or makes up the principal fact and link in such chain need not to be found to be true beyond a reasonable doubt. If the court had so instructed, such instruction would

have been proper. Whatever facts or circumstances may have entered into and formed a part of a link in the chain, each minute circumstance or fact that went to make up the sum total constituting a link need not be found by the jury to be true beyond a reasonable doubt; but the link itself, taking all the evidence together to establish that link, must be found to be true beyond a reasonable doubt. In other words, the chain can be no stronger than the weakest link in it. If one link in the chain is not found to be true beyond a reasonable doubt, then the chain is broken, and the defendants must be acquitted. The court afterward gave a proper instruction upon this question: "In law, the defendants are presumed to be innocent of the offense preferred against them, innocent of any guilty intent, and innocent of every fact necessary for the state to prove in order to establish their guilt. And this presumption of innocence continues to operate in their favor until their guilt is proven by the evidence, and until each and every fact necessary to constitute the offense charged against them is so proved beyond a reasonable doubt."

In this the court gave the law to the jury as it ought to have been given.

It is recommended that the judgment of the court below be reversed, and a new trial ordered.

By the COURT. It is so ordered.

CRIMINAL LAW. — A fact stated in an indictment may be rejected as surplusage, if it be merely in aggravation, so that it may be stricken out and yet leave the offense fully described: *State v. Smith*, 32 Me. 369; 54 Am. Dec. 578. Every indictment must show upon its face that some public law of the state has been violated, and that the offender has been indicted therefor in the manner and within the time prescribed by the law of the land: *State v. Ball*, 30 W. Va. 382.

CRIMINAL EVIDENCE — DYING DECLARATIONS. — As to what is admissible as a dying declaration, see extended note to *Field v. State*, 34 Am. Rep. 479-482; *People v. Vernon*, 35 Cal. 49; 95 Am. Dec. 49; *Commonwealth v. Cooper*, 5 Allen, 495; 81 Am. Dec. 762, and note 764. Dying declarations made in the face of impending death, after the declarant had been informed of his condition and fully comprehended it, are admissible in evidence: *State v. Stephens*, 98 Mo. 637; *State v. Johnson*, 72 Iowa, 393; *People v. Lee Sare Bo*, 72 Cal. 623; *People v. Ramirez*, 73 Id. 403; *People v. Brady*, 72 Id. 490; *Miller v. State*, 27 Tex. App. 63; *People v. Farmer*, 77 Cal. 1.

HARMLESS ERROR. — For instances of error which are harmless, because working no prejudice to appellant, see *Columbus etc. R'y Co. v. Bridges*, 86 Ala. 448; 11 Am. St. Rep. 58, and note 64, with cases there cited.

CONSPIRACY. — As to when several persons conspiring to commit one unlawful act are liable for other unlawful acts committed by one or more of their number, see *Spies v. People*, 122 Ill. 1; 3 Am. St. Rep. 320, and note; *Phillips v. State*, 26 Tex. App. 228; 8 Am. St. Rep. 471, and note 477; *Bowers v. State*, 24 Tex. App. 542; 5 Am. St. Rep. 901, and note 905.

METSKEK v. NEALLY.

[41 KANSAS, 122.]

OFFICE AND OFFICER. — MANDAMUS IS PROPER ACTION TO RESTORE OFFICER TO OFFICE from which he has been illegally ousted, whether by removal or suspension; and a restoration to office should be accompanied by a restoration of all the records, instruments, and insignia of office of which he has been deprived by the illegal ouster.

MUNICIPAL CORPORATIONS. — MAYOR OF CITY OF FIRST CLASS HAS NO AUTHORITY, in the absence of a statute or city ordinance conferring the power, either to remove or suspend the city engineer from his office and duties.

W. A. S. Bird, city attorney, A. Bergen, and W. C. Webb, for the plaintiffs in error.

Rossington, Smith, and Dallas, and W. P. Douthitt, for the defendant in error.

HOLT, C. This is an action in *mandamus*. The alternative writ sets forth, substantially, that George T. Neally was the city engineer of the city of Topeka, a city of the first class; that on the third day of July, 1888, D. C. Metsker, as mayor, attempted to suspend him from his office, and place therein William Tweeddale; and that John F. Carter, as city marshal, acting in concert with the mayor, forcibly and unlawfully deprived plaintiff of his office-room, books, papers, records, etc., and prevented him from exercising the duties of his office. The defendant moved to quash the writ, which was overruled by the court, and, they declining to make any further return, the alternative writ was made peremptory. The defendants, plaintiffs in error, excepted to this judgment, and bring the case here for review.

The defendants say, first, this action cannot be maintained against them, claiming that the plaintiff was simply suspended from his office, not removed; in their brief, they seek to make a distinction between the authority to remove a city officer and to suspend him. They claim that the authority to remove a city officer requires a greater amount of power than to simply suspend him; that a mayor, by virtue of his office

and as an incidental and inherent power thereof, can, at any time, suspend an officer, even though he may have no power given by statute or ordinance to amove him. They cite authorities which are to the effect that the power to suspend is included in the power to amove. We can readily believe that the greater power to amove might include the lesser one to suspend, but we have failed to notice any instance where the power to amove is not conceded that the authority to suspend is admitted. In this instance, the plaintiff was not suspended pending any examination of charges against him, which, if found true, would have been grounds for a removal; he was suspended without charges against him, and without notice.

We cannot accept the claims of defendants as to the wide difference between removal and suspension from a municipal office. In its effects, so far as the merits of this action are concerned, the plaintiff would be deprived of his office whether removed or suspended, in one way permanently, in the other for an indefinite and uncertain time. In some instances, a suspension would practically be equivalent to a removal; it would be the case where the duration of the suspension extended beyond the term for which the officer suspended was elected or appointed. We fail to see any difference between an illegal removal and an illegal suspension, so far as this action is concerned, except in the possible difference of time the officer would be deprived of the possession and enjoyment of his office; certainly when it comes to the remedies for the restoration of an officer unlawfully removed or unlawfully suspended, we cannot perceive why the remedy in one case should not be applicable in the other. If the mayor exceeded his powers in suspending plaintiff, and the city marshal, as an officer, and the *de facto*, or as defendants style him, the "*ad interim* engineer," assist in keeping him out of the lawful occupation and peaceable possession of the same, then this writ was properly issued.

In fact it is not seriously disputed by the defendants that *mandamus* would be the proper remedy to restore a party to an office from which he had been illegally removed. The same reasons given to sustain this remedy in cases of removal apply with equal force where the occupant of an office had been illegally suspended. If the title to this office were in dispute, the action to determine it would probably be *quo warranto*; but it is admitted that the plaintiff was the city engineer by regular appointment, and in the actual and law-

ful possession and enjoyment of the office. There is no question of a contested election or disputed right to this office, except as it arises from the suspension alone. The plaintiff, up to July 3d, was the city engineer by undisputed right; was he legally or illegally suspended?—that is the sole question to be decided in this action. We believe *mandamus* is the proper action to restore an officer to his office when he, having the actual possession and undisputed right to the same, is illegally ousted therefrom, whether by removal or suspension: *Stats v. Common Council*, 9 Wis. 254; *Stats v. Jersey City*, 25 N. J. L. 536; *Rex v. Barker*, 3 Burr. 1266; *Fuller v. Trustees*, 6 Conn. 532; *Howard v. Gage*, 6 Mass. 461; *In re Strong*, 37 Id. 484; *St. Louis County Court v. Sparks*, 10 Mo. 118; 45 Am. Dec. 355; *Commonwealth v. Guardians etc.*, 6 Serg. & R. 468; *Milliken v City Council etc.*, 54 Tex. 388; 38 Am. Rep. 629; *Ex parte Wiley*, 54 Ala. 226; Dillon on Municipal Corporations, sec. 248, and note; High on Extraordinary Legal Remedies, secs. 67 et seq., and 407-409.

If the suspension of plaintiff was unauthorized, there could have been no vacancy to fill, and the appointment of Tweedale was without authority of law; and plaintiff's office-room, books, records, instruments, insignia, etc., having been taken from him by reason of such illegal suspension, it follows that a restoration to office should be accompanied by a restoration of all things pertaining to the office of which he had been deprived; for this relief *mandamus* is the proper remedy: *Ather-ton v. Sherwood*, 15 Minn. 221; *People v. Kilduff*, 15 Ill. 492; 60 Am. Dec. 769; *People v. Head*, 25 Ill. 325; *Trustees v. Fogg*, 78 Ind. 269; *Nelson v. Edwards*, 55 Tex. 389; High on Extraordinary Legal Remedies, secs. 73 et seq.; Dillon on Municipal Corporations, sec. 302.

The vital question to be determined in this case is, whether the mayor had authority to suspend plaintiff from the office of city engineer. There is no statute nor ordinance of the city in *hæc verba* giving him the power to suspend the city engineer from his office and duties. The statute provides that he may remove the marshal, assistant marshal, and any policeman,—these, and these only, of the city officers: Comp. Laws 1885, c. 18, sec. 72. The plaintiff argues that because these officers are named, no other officers can be removed or suspended by him, citing the well-known rule that the naming of one excludes all others; the defendants, admitting the general rule, deny its application in this case. They say that the

provisions in regard to the removal of the marshal, etc., are found in article 5 of chapter 18, while the powers and duties of the mayor are defined under article 4, and this reference to the mayor in article 5 is only incidental, and does in no way tend to limit the powers of the mayor as defined in article 4. They cite, as showing the powers of the mayor, sections 39 and 47:—

“Sec. 39. The mayor shall preside at all the meetings of the council, except as herein otherwise provided, and shall have the superintending control of all the officers and affairs of the city, and shall take care that the ordinances of the city are complied with.”

“Sec. 47. The mayor shall be active and vigilant in enforcing all laws and ordinances for the government of the city; and he shall cause all subordinate officers to be dealt with promptly for any neglect or violation of duty.”

Section 39 gives him the superintending control over all the officers of the city, and the defendants contend that would empower him to suspend; that the power to do so would be a necessary adjunct of the authority to control. We are of the opinion that authority to control would not confer the power to suspend; it does not to remove, evidently; for if it gave the power to remove, there would have been no necessity for an express provision for removing the marshal, etc. In section 47 it is provided that he shall cause all subordinate officers to be dealt with promptly for any neglect or violation of duty, not that he shall deal with them himself, but shall cause such officers to be dealt with, presumably by the proper authority.

We are of the opinion that the power to remove is lodged in the corporation itself, and must be exercised by it at large, unless such power has been delegated to some officer or officers thereof by statute or ordinance. The governing and controlling power of a city is lodged in the mayor and council ordinarily, and therefore the power to remove rests with them jointly, there being no such authority given to the mayor in express terms, or inferentially even, as we understand and interpret the statute: Dillon on Municipal Corporations, secs. 241-243, and authorities there cited. In the absence of such provision, the mayor alone, being only a part of the governing power of the city, could neither remove nor suspend the city engineer; therefore his order suspending the plaintiff on the 3d of July from the office of city engineer was illegal and void.

We think the judgment of the court was correct, and recommend that it be affirmed.

By the COURT. It is so ordered.

MANDAMUS.—To RESTORE AN OFFICER UNLAWFULLY REMOVED, when *mandamus* is the proper remedy, see extended note to *State v. Dunn*, 12 Am. Dec. 28-31. *Mandamus* will not lie to try title to office, nor to compel a person holding office to admit another thereto: *People v. Olds*, 3 Cal. 167; 58 Am. Dec. 398, and note 407; *St. Louis County Court v. Sparks*, 10 Mo. 117; 45 Am. Dec. 355, and note 359; *State v. Rodman*, 43 Mo. 260; *Biggs v. Mc-Bride*, 17 Or. 640; *Mannix v. State*, 115 Ind. 245.

MANDAMUS IS A PROCEEDING TO COMPEL ACTION, not to correct errors, and where there is a plain and adequate remedy at law, it will not be granted: *State v. Kinkaid*, 23 Neb. 641.

MUNGER v. BALDRIDGE.

[41 KANSAS, 283.]

HUSBAND AND WIFE.—BY KANSAS COMPILED LAWS OF 1885, CHAPTER 62, WIFE IS PLACED ON EQUALITY WITH HUSBAND in respect to holding, controlling, and disposing of property which she may own at the time of her marriage, or which may afterward be acquired by her. The right of the husband to act as the agent of the wife, and to contract with her, is recognized, and the conveyance of real estate directly from the husband to the wife will be upheld, so far as it is equitable to do so.

HUSBAND AND WIFE.—WIFE MAY APPOINT HER HUSBAND BY POWER OF ATTORNEY AS HER AGENT AND ATTORNEY IN FACT, to convey the inchoate interest which she holds in his real estate, and an instrument duly executed by himself, and by him for her under such authority, is effectual to transfer such interest.

AGENCY.—POWER OF ATTORNEY TO CONVEY LANDS NEED NOT DESCRIBE IN DETAIL the lands authorized to be conveyed, and a power granted by wife to husband "to execute and acknowledge, sign, seal, and deliver any deed or deeds for the conveyance or assurance of all my right, title, and interest in and to any lands and tenements the title to which is in the said D. S. Munger, and in which I have any interest as being the wife of him, said D. S. Munger," is sufficient to authorize the conveyance of her interest in any lands then owned by D. S. Munger within the county where the power of attorney was recorded.

AGENCY.—EXECUTION OF POWER OF ATTORNEY.—IT IS NOT REQUIRED that power of attorney shall be executed in the presence of the officer before whom it is acknowledged, nor is it material that he should know that the signature was written by the grantor. If the grantor acknowledges before the officer the due execution of the instrument, he thereby recognizes and adopts the signature as his own.

AGENCY.—ACKNOWLEDGMENT OF POWER OF ATTORNEY.—IT IS SUBSTANTIAL COMPLIANCE WITH REQUIREMENTS OF STATUTE as to the acknowledgment to power of attorney, where the officer certifies that at a certain time "came Julia P. Munger, who is personally known to me to be the AM. ST. REP., VOL. XIII.—18

identical person whose name is affixed to the foregoing instrument of writing as grantor, and duly acknowledges that she executed the same, and for the purposes therein set forth."

DEEDS — ACKNOWLEDGMENT. — **CERTIFICATE OF ACKNOWLEDGMENT IS NOT ESSENTIAL TO VALIDITY OF DEED OF CONVEYANCE**, but is simply evidence of the execution of the deed; and where the certificate is absent, the execution may be established by other proof.

PLEADING. — **DEMURRER TO PLEADING IN WHICH EXECUTION OF DEED IS ALLEGED ADMITS the execution of the instrument, and no question as to the sufficiency of the certificate of acknowledgment is raised.**

ACTION of ejectment brought by Julia P. Munger against D. H. Baldridge and others to recover a certain tract of land, the possession of which was alleged to be unlawfully withheld from her by the defendants. The defendant Baldridge filed an answer and cross-petition, containing a general denial, and setting out that D. S. Munger and the plaintiff, J. P. Munger, executed and delivered, for a good and valuable consideration, a deed of general warranty to one Werner, conveying the said real estate, and that the title to a portion thereof had passed through several parties to said Baldridge. The deed was executed by D. S. Munger for himself, and by Julia P. Munger by D. S. Munger, her attorney in fact; and the letter of attorney under which D. S. Munger executed the deed in behalf of his wife was recorded in the office of the register of deeds of Sedgwick County. Other facts appear in the opinion. A demurrer to the answer and cross-petition was overruled, and the plaintiff standing upon her demurrer, judgment was entered for the defendant, and the plaintiff alleged error.

Humphrey and Allen, for the plaintiff in error.

D. W. Welty, and Keenan and Sargent, for the defendant in error.

JOHNSTON, J. By this action, Julia P. Munger seeks to recover valuable real estate in the city of Wichita, which was formerly owned by D. S. Munger, her husband. He conveyed the same by warranty deed in 1877, which was executed by signing his own name thereto, and also that of his wife, as her attorney in fact, under a power of attorney previously given by her. Long after the conveyance, and when the property has become valuable, she questions the validity of her own act, and now asserts that the power of attorney is invalid for want of capacity to make the same, and that it and the deed of conveyance are defective in form. She contends that by reason of being a married woman, she was incapable of ap-

pointing her husband, by letter of attorney, as her agent to convey the inchoate interest which she held in her husband's real estate. The arguments and authorities cited to sustain this view proceed upon the common-law theory that the marriage rendered the wife incapable of making contracts, and hence incapable of appointing an agent or attorney to act for her. These arguments and authorities are inapplicable in this state, where the disabling rules of the common law have been largely changed by the statute. By legislative enactment, the wife has been placed on an equality with the husband in respect to holding, controlling, and disposing of property which she may own at the time of the marriage, or which may afterward be acquired by her. During coverture she is specifically empowered to carry on any trade or business, and perform any labor or service on her sole and separate account; she may sue and be sued in the same manner as if she were unmarried, and "may bargain, sell, and convey her real and personal property, and enter into any contract with reference to the same, in the same manner, to the same extent, and with like effect as a married man may in relation to his real and personal property": Comp. Laws 1885, c. 62, secs. 1-4. While the unity of the husband and wife in the marital relation in a certain sense remains, these provisions have brushed away many of the disabilities of the wife under the common law; have recognized her individual existence, and conferred upon her distinct rights and powers respecting contracts, the carrying on of business, the owning, controlling, and disposing of property, equal to those held and enjoyed by the husband. She is clothed with power to manage her own affairs, and certainly has power to appoint an agent or attorney to do that which she is capable of doing in person. The right of the husband to act as the agent of the wife, and to contract with her, has been repeatedly recognized by this court, and it has been held that the conveyance of real estate directly from the husband to the wife would be upheld, so far as it was equitable to uphold the same: *Sprout v. Atchison Nat. Bank*, 22 Kan. 336; *Horder v. Horder*, 23 Id. 391, and cases cited; 33 Am. Rep. 167.

In respect to conveying property, or any interest which she may hold therein, she stands on an equal footing with the husband, and is governed by the same rule. No restrictions are placed upon the wife, and no other or different methods of conveying property, real or personal, are prescribed. As has

been seen, she is in respect to property a distinct person, with distinct and separate rights from her husband, authorized to "enter into any contract with reference to the same, in the same manner, to the same extent, and with like effect as a married man in relation to his real and personal property." At the same time the legislature provided the methods by which real estate should be conveyed, and the language used is general, and applicable alike to all persons. It was enacted that "conveyances of land, or of any other estate or interest therein, may be made by deed executed by any person having authority to convey the same, or by his agent or attorney, and may be acknowledged and recorded as herein directed, without any other act or ceremony whatever": Comp. Laws 1885, c. 22, sec. 3. By section 7 of the same act it is provided that "all deeds or other conveyances of land, or of any estate or interest therein, shall be subscribed by the party granting the same, or by his lawful agent or attorney, and may be acknowledged or proved and certified in the manner herein prescribed." No distinction is made between the wife and any other person, either in the manner of execution or the acknowledgment of a conveyance of real estate. By virtue of this legislation, the wife is undoubtedly authorized to convey any real estate or interest therein which she owns, and which is subject to conveyance. It is equally clear that she is left free to select whomsoever she pleases as her agent or attorney for that purpose, and there is no reason why her husband may not act in that capacity. It is contended, however, that the wife cannot dispose of her inchoate interest in her husband's real estate in this way. It is argued that she does not hold an estate or interest in the land, but a mere contingent right, which is not property, but is similar to the right of dower, which is not contemplated by the legislature in the acts referred to, and can only be transferred in the manner in which the right of dower was formerly transferred. The estate of dower has been expressly abolished by the legislature of Kansas, and an interest differing both in quantity and quality has been provided for the wife. It is true, as counsel suggests, that section 646 of the code, relating to the distribution of property when a divorce is granted, refers to the portion which the wife shall receive, if she survives her husband, as a right of dower. But in *Crane v. Fipps*, 29 Kan. 585, it was decided that this provision was not intended to create the right of dower, and in the present state of the law was inoperative. The interest of

the wife in the real estate of her husband during marriage is a contingent one, it is true, but it is unquestionably property, and no reason has been advanced why she may not empower the husband to act for her, and in conjunction with himself convey it away. In *Busenbark v. Busenbark*, 33 Id. 572, the nature of this interest was considered, and it was determined that while it was inchoate and uncertain, it still possessed the elements of property, which may be, in connection with the husband, the subject of contract and bargain, and was of such a character that the wife might, during marriage, maintain an action for its protection, and for relief from fraudulent alienation by her husband. That it is an existing interest, and one which may be the subject of conveyance by the wife during marriage, is expressly recognized by the statute defining the same, as follows: "One half in value of all the real estate in which the husband at any time during the marriage had a legal or equitable interest, which has not been sold on execution or other judicial sale, and not necessary for the payment of debts, and of which the wife has made no conveyance, shall, under the direction of the probate court, be set apart by the executor as her property in fee-simple upon the death of the husband, if she survive him": Comp. Laws 1885, c. 33, sec. 8.

How shall this interest be conveyed? If, as contended, it attaches to the estate of the husband, and must be conveyed in conjunction with him, still it is the property of the wife, an interest in real estate, and the statute respecting conveyances makes no distinction between this and any other real property or interest therein which the wife may have. When it is admitted that it is property and an existing interest in real estate, the act respecting conveyances, already cited, certainly applies. Its provisions are broad and comprehensive, and authorize a conveyance by any person of any interest in real estate in the manner directed; and also that it may be done by any person through an agent or attorney. They apply to all persons, male and female, married and unmarried, and nothing in the law or its policy forbids that the husband should act as the agent or attorney of the wife in this respect, or which would exclude the conveyance of this interest from the ordinary rules laid down in the statute. Nor is there any ground for the claim that the interest of the husband is adverse to that of the wife, making it improper for him to act in her behalf. The statutes of Kansas recognize no conflict of interest between them, nor any necessity to protect the wife against the

act of the husband. They do not contemplate that she may be led to convey her interest through fear, compulsion, or the undue influence of her husband; and hence we have no enactment, as some states do, that in making a conveyance she must undergo a private examination by an officer to learn whether she is intimidated by her husband, or is executing the conveyance against her will. On the contrary, the law proceeds upon the theory of confidence, good faith, and honest dealing between husband and wife; and while there may be cases where the husband may take advantage of this confidence, yet it is almost as liable to occur through his obtaining her signature to the deed of conveyance as it would be in procuring from her a power of attorney authorizing him to convey the same property. We conclude that the wife can appoint her husband as her agent and attorney in fact to convey the inchoate interest which she holds in his real estate, and that an instrument duly executed by himself and by him for her under such authority is effectual to transfer such interest.

The remaining objections made by the plaintiff in error are technical in their character, and under the circumstances of the case are not entitled to serious consideration. She claims that the power of attorney is invalid because the property authorized to be conveyed is not sufficiently described. The power granted is "to execute and acknowledge, sign, seal, and deliver any deed or deeds for the conveyance or assurance of all my right, title, and interest in and to any lands and tenements the title to which is in the said D. S. Munger, and in which I have any interest as being the wife of him, said D. S. Munger." The language employed is sufficiently broad to include all lands owned by the husband at the time the letter was executed, and specific enough to authorize the conveyance of the land in controversy. The word "any" is to be taken in the broader sense, and includes all or any particular portion of the lands then owned by D. S. Munger. A detailed description of the lands which he owned was unnecessary. A power of attorney is required to be recorded in the office of the register of deeds of the county in which the lands to be conveyed are situate; and the pleadings show that the power of attorney in the present case was recorded, in compliance with such statute, in Sedgwick County, where the lands in controversy lie, and this would authorize the sale of any land which D. S. Munger owned within that county. As the power authorized the sale of any lands the title to which was in

D. S. Munger at a stated time, the lands intended to be conveyed can be definitely ascertained; and the rule is, that that is sufficiently certain which can be made certain. Whatever might be held in other cases and under other circumstances with respect to the sufficiency of such a description, it must be held sufficient as against the claim of the one who executes the power of attorney under which the land has been transferred through several hands, and where the party has stood by for many years, as the plaintiff has done, until the property has become valuable, without questioning the validity of the instrument.

The acknowledgment of the power of attorney is said to be insufficient. The objection is, that the officer taking the acknowledgment failed to certify that the person making the same was personally known to him as the person who executed the instrument. He does certify that Julia P. Munger is personally known "to me to be the identical person whose name is affixed to the foregoing instrument of writing as grantor, and duly acknowledges that she executed the same, and for the purposes therein set forth." This substantially complies with the requirements of the statute, and only a substantial compliance is required. It is not required that the instrument shall be executed in the presence of the officer, nor is it material that he should know that the signature was written by the grantor; for if the grantor acknowledges before the officer the due execution of the instrument, he thereby recognizes and adopts the signature as his own.

The final objection is, that the deed conveying the property was not legally acknowledged. The challenged portion of the certificate reads as follows: "Came D. S. Munger and Julia P. Munger, his wife, by D. S. Munger, her attorney in fact, who are personally known to me to be the same persons who executed the foregoing instrument of writing, and duly acknowledged the execution of the same." It might have been more explicit in stating that D. S. Munger acknowledged the execution of the deed for himself, and also in his representative capacity for his principal, Julia P. Munger. But as the plural form of expression is used, it plainly implies an acknowledgment in both his individual and representative capacities, and that in the latter capacity he acknowledged the deed as the act of his principal, who was named in the certificate. The sufficiency of the acknowledgment, however, was not properly raised by the demurrer, as the certificate of

acknowledgment is not essential to the validity of the instrument. It is simply evidence of the execution of the deed, and where the certificate is absent the execution may be established by other proof. An unacknowledged deed passes title equally with one duly acknowledged and certified; but of course it would not be admitted in evidence upon the trial until its execution was shown by competent testimony. The question of the sufficiency of the certificate of acknowledgment can only be raised when the deed is offered in evidence; and if it is found to be defective, it can then be supplied by direct proof of execution: *Gray v. Ulrich*, 8 Kan. 122; *Arn v. Matthews*, 39 Id. 274. The execution of the conveyance, however, was alleged in the answer and admitted by the demurrer, and hence the certificate of acknowledgment is of no consequence at this time.

The judgment of the district court will be affirmed.

MARRIED WOMEN. — Power of married women to contract under the American statutes: See extended note to *Kantrowitz v. Prather*, 99 Am. Dec. 599-610; *Cook v. Walling*, 117 Ind. 9; 10 Am. St. Rep. 17, and note 21; compare *Stafford Sav. Bank v. Underwood*, 54 Conn. 2; *Fallon v. McAlonen*, 18 R. I. 223; *Clark v. Clark*, 16 Or. 224; *City of Wyandotte v. Agan*, 37 Kan. 523; *Bridgers v. Bridgers*, 101 N. C. 71; *Shortel v. Young*, 23 Neb. 408; *Erwin v. Puryear*, 50 Ark. 356; *Laidley v. Land Co.*, 30 W. Va. 505; *Vining v. Willis*, 40 Kan. 609; *Turner v. Shaw*, 96 Mo. 22; *Botts v. Knabb*, 116 Pa. St. 28; *Elliot v. Gregory*, 115 Ind. 93, for instances of when a married woman is upon the same footing as a *feme sole* with respect to her property rights.

POWERS OF ATTORNEY. — As to the construction and execution of powers of attorney, as well as the validity of deeds executed thereunder, see note to *Davenport v. Parsons*, 81 Am. Dec. 776-778. In construing a power of attorney, the intention of the parties, and not the letter, must control; and if the object can be ascertained from the instrument, it must be so construed as to effectually carry out that object: *Commonwealth v. Hawkins*, 83 Ky. 246; compare *Barnard v. Blum*, 69 Tex. 608; *Sinclair v. Stanley*, 69 Id. 718.

ACKNOWLEDGMENTS OF SEALED INSTRUMENTS. — For the law applicable to acknowledgments generally: Extended note to *Livingston v. Kettelle*, 41 Am. Dec. 163-184. As to when an acknowledgment is fatally defective: Note to *Tully v. Davis*, 83 Id. 180, 181. The omission of a material word, if the mistake is apparent from the context, will not vitiate an acknowledgment: *Talbert v. Dull*, 70 Tex. 675; compare *Cupp v. Welch*, 50 Ark. 294.

POWER OF ATTORNEY. — The acknowledgment and recording of a power of attorney are not essential to render it admissible in evidence: *Valentine v. Piper*, 22 Pick. 85; 33 Am. Dec. 715.

DEEDS — ACKNOWLEDGMENTS. — An unrecorded and unacknowledged deed passes title between the parties: *Floyd v. Ricks*, 14 Ark. 286; 58 Am. Dec. 374. No legal estate in lands will pass until the deed of conveyance has been duly proved and registered: *Anderson v. Logan*, 99 N. C. 474. A married woman's deed, not legally acknowledged, does not pass her interest:

East v. Goff, 94 Mo. 511. A mere defective acknowledgment does not vitiate an instrument between the parties thereto: *Webb v. Burney*, 70 Tex. 322. An acknowledgment of the execution and delivery of a deed is *prima facie* evidence of the delivery of such deed: *Terhune v. Oldie*, 44 N. J. Eq. 146.

DEMURRERS ADMIT THE TRUTH of every fact and intent which is sufficiently averred, and no more: *Manning v. Pippen*, 86 Ala. 357; 11 Am. St. Rep. 46, and note 50, 51.

WILHITE v. WILLIAMS.

[41 KANSAS, 288.]

PLEADING. — PETITION IS DEFECTIVE AND INSUFFICIENT which fails to describe who is plaintiff and who defendant, either in the title or elsewhere, except as it may appear from the order or position in which the names are placed in the heading, and which omits to name the pleading by inserting the word "petition" after the title of the cause, as positively required by the Kansas code.

REPLEVIN. — PETITION IN ACTION OF REPLEVIN WHICH FAILS TO ALLEGE the unlawful detention of the property by the defendant as against the plaintiff is fatally defective, and should be so held, even upon objection to the introduction of any evidence made at the beginning of the trial; and the fact that the affidavit filed in the case to obtain an order of delivery contained such an allegation will not cure the defect in the petition.

EXEMPTIONS. — HORSE, HARNESS, AND BUGGY OF INSURANCE AGENT, bought by him and used for the purpose of carrying on his business, and necessary to the successful prosecution thereof, are exempt under subdivisions 5 and 8 of section 3 of the Kansas act, relating to exemptions, the claimant being a resident of the state and the head of a family. The horse is exempt as within the description of animals named in said subdivision 5 as absolutely exempt, and the buggy and harness must be held to be within the description of tools and implements used and kept by the debtor for the purpose of carrying on his business, and, therefore, exempt under said subdivision 8.

REPLEVIN for a horse, harness, and buggy, brought by Williams against Wilhite, as sheriff, who filed a general denial. At the commencement of the trial, which was had without a jury, Wilhite objected to the introduction of any evidence, for the reason that the petition did not state facts sufficient to constitute a cause of action. The objection was overruled, and an exception taken. Other facts appear in the opinion. Upon the evidence introduced by the parties, the court found for the plaintiff, and the rulings of the court are assigned for error.

Kellogg and Sedgwick, for the plaintiff in error.

Cunningham and McCarty, for the defendant in error.

JOHNSTON, J. The insufficiency of the petition is first presented, and that it is fatally defective will be readily seen. It fails to describe who is plaintiff and who is defendant, either in the title or elsewhere, except as it may appear from the order or position in which the names are placed in the heading. Then there is an omission to name the pleading by inserting the word "petition" after the title of the cause, as the code positively requires. As the case comes to us, probably neither of these objections is so serious as to be fatal; but another and more serious one is raised by the objection to the introduction of any testimony, which was made at the beginning of the trial. It is nowhere stated that Wilhite unlawfully detained the property from the plaintiff, nor is it even alleged that he had it in possession in any way or for any purpose. The gist of the action of replevin under our code is the unlawful detention of the property by the defendant as against the plaintiff; and to maintain the action, the plaintiff must allege this fact in his petition: *Wilson v. Fuller*, 9 Kan. 176; *Hoisington v. Armstrong*, 22 Id. 110.

There is a recitation in the record that the affidavit filed in the case was "in due form of law, and sufficient"; and it is suggested that, being so, it must have contained the allegation that the property was wrongfully detained by the defendant, and that this would cure the defect in the petition. In an action of replevin in justice court, the affidavit may be treated as a bill of particulars, because the statute does not require any additional pleading to be filed in such an action before a justice of the peace: *Starr v. Hinshaw*, 23 Kan. 532; but not so in the district court, where the petition cannot be dispensed with. There the purpose of the affidavit is to obtain an order of delivery, and its allegations cannot be used to supplement or supply the material averments required to be stated in the petition. It is no part of the pleadings in the case, and the facts stated therein form no part of the issues unless contained in the pleadings: *Crawford v. Furlong*, 21 Id. 698; *Hoisington v. Armstrong*, 22 Id. 110. Granting, then, that the affidavit contained this most important allegation, it did not strengthen the petition, nor did any subsequent pleading in the case supply what was lacking, as the defendant answered by a general denial. While a petition is to be liberally construed when its sufficiency is only raised by an objection to the introduction of any evidence, yet the defect in this petition is so great, by failing to state inferentially or otherwise a wrongful

detention by the defendant, that the court should have sustained the objection; and hence there must be a reversal.

As the petition can be, and doubtless will be, amended when the case is remanded, we have concluded to examine the principal point of controversy between the parties upon the merits of the action, which is the exemption of the property seized and sold by the plaintiff in error. Williams was the head of a family, and his occupation was soliciting life insurance in Emporia and in the surrounding country, embracing Lyon and adjoining counties. He purchased the horse, harness, and buggy for the purpose of carrying on his business, for which they were adapted, and they were being so used when the sheriff levied upon them. In regard to the horse, there can be no question that it was exempt under the fifth subdivision of section 3 of the act relating to exemptions. The language employed in that clause is general, and evidently the legislature did not intend to restrict the exemption to persons pursuing any particular occupation, or those making any particular use of the property therein mentioned, or to any particular class of debtors, except that they must be residents of the state and heads of families. Every person who resides in the state and is the head of a family is entitled to the benefits of the exemption, and the animals and articles therein named are absolutely exempt to him, regardless of their use or of his occupation: *Nusman v. Schooley*, 36 Kan. 177.

It is equally clear that the buggy and harness were exempt to the debtor under subdivision 3 of section 3 of the same act, which provides that there shall be exempt "the necessary tools and implements of any mechanic, miner, or other person, used and kept for the purpose of carrying on his trade or business, and in addition thereto stock in trade not exceeding four hundred dollars in value." Applying the liberal construction to which exemption laws are entitled, and which this court has always given them, the business of soliciting insurance is within the statute quoted, and the buggy and harness must be held to be within the description of tools and implements used and kept by the debtor for the purpose of carrying on his business. This view was substantially held in *Davidson v. Sechrist*, 28 Kan. 324 (232). There a resident of the state, not the head of a family, who was an insurance agent and abstractor of titles, claimed that an iron safe, a cabinet and table, and a set of abstracts, were exempt as the necessary tools and instruments used and kept for carrying on his business. The ex-

emption was claimed under the third clause of section 4, and the language there employed is almost identical with subdivision 8 of section 3, giving the exemption to heads of families, and which has been quoted. It was held by the court that the phrase "mechanic, miner, or other person" was sufficiently broad to include the insurance agent, and that the property named came within the description of tools and instruments used and kept for the purpose of carrying on his trade or business, and that a contrary holding would not be in accordance with the beneficent design of the exemption laws. This interpretation applies to the case in hand, and is controlling. The early case of *Gordon v. Shields*, 7 Kan. 320, is referred to as an authority against this interpretation. The only question before the court in that case was whether a buggy was included in the term "wagon," as used in the sixth subdivision of section 3. It is true that the party claiming the exemption in that case was an insurance agent, and the property claimed was used in carrying on his business as such agent; yet the property was not claimed to be exempt under the eighth subdivision of the section, and it received no consideration or interpretation from the court. This is made more apparent in the concurring opinion of Mr. Justice Valentine, who states that in his opinion the property might have been claimed under the eighth subdivision of the section; but as that question was not raised by counsel, possibly the court was not required to examine it.

We think the court correctly held the property to be exempt, but for the error heretofore mentioned the judgment must be reversed, and the cause remanded for such further action as the parties hereto desire to take.

EXEMPTIONS. — As to the law exempting tools from execution, see extended note to *Kilburn v. Demming*, 21 Am. Dec. 545-554; *Abraham v. Davenport*, 73 Iowa, 111; 5 Am. St. Rep. 665; *Watson v. Lederer*, 11 Col. 577; 7 Am. St. Rep. 263, and note 267; *Murphy v. Harris*, 77 Cal. 194; *Baker v. Willis*, 123 Mass. 194; 25 Am. Rep. 61, and extended note 63-67; *Richards v. Hubbard*, 59 N. H. 158; 47 Am. Rep. 188, and note 190-192.

REPLEVIN — PLEADING. — The complaint in replevin must allege that the goods are plaintiff's property, and were taken out of his possession: *Luther v. Arnold*, 8 Rich. 24; 62 Am. Dec. 422. Compare *Oleson v. Merrill*, 20 Wis. 462; 91 Am. Dec. 428; *Pattison v. Adams*, 7 Hill, 126; 42 Am. Dec. 59; *Morris v. Burley*, 74 Iowa, 45; *Afterbach v. McGovern*, 79 Cal. 268.

REMEDY OF A DEBTOR WHOSE EXEMPTION RIGHTS HAVE BEEN DISREGARDED: See extended note to *Van Dresser v. King*, 75 Am. Dec. 645-653.

LA CLEF v. CITY OF CONCORDIA.

[41 KANSAS, 323.]

MUNICIPAL CORPORATIONS. — CITY IS NOT LIABLE TO PERSONAL ACTION for injuries resulting from the enforcement of the public laws affecting the state at large.

MUNICIPAL CORPORATIONS. — CITY IS NOT LIABLE IN DAMAGES to a person who was confined in the city prison upon a conviction for disturbing the peace and quiet of the city, and who sustained injuries by reason of the bad condition of the prison or the negligence of the officer in charge thereof.

ACTION brought by La Clef against the city of Concordia to recover damages for injuries sustained by reason of being committed to the city prison by the defendant. The petition alleged in substance that the plaintiff was arrested, tried for, and found guilty of the offense of disturbing the peace and quiet of the city of Concordia; that he was subjected to a fine, and adjudged to pay the costs, but was unable to do so, and was, upon a commitment issued by the police judge of the city, committed to the city prison, and was there kept from the fifteenth until the seventeenth day of November; that at the time of his arrest and commitment he was a robust man, in good health; that the city prison was an open building, with cracks therein which admitted the cold, and was not provided with any means of heating, and that during all of said time he was confined therein he was without any fire, and was unprovided with bedding by which to keep warm; that during said time the weather was severely cold, the thermometer showing ten degrees below zero, and while thus exposed he contracted a cold, resulting in consumption, which is now incurable. The defendant demurred to the petition, upon the ground that it did not state a cause of action; and the demurrer was sustained. The plaintiff complains of this ruling.

S. D. Houston and B. R. Anderson, for the plaintiff in error.

Laing and Wrong, for the defendant in error.

CLOGSTON, C. For the purposes of this case it will be presumed that the plaintiff has sustained the injuries complained of, and that his petition is in all respects sufficient to entitle him to recover, if the city is liable for this class of injuries. It has already been held in this state that counties are not liable for injuries of this kind: *Pfefferle v. Comm'rs of Lyon Co.*, 39 Kan. 432. And this seems to be the doctrine universally held elsewhere: *Wehn v. Gage*, 5 Neb. 494; 25 Am.

Rep. 497; *Crowell v. Sonoma Co.*, 25 Cal. 313; *Miller v. Iron Co.*, 29 Mo. 122; *Waltham v. Kemper*, 55 Ill. 346; 8 Am. Rep. 652; *Brabham v. Supervisors*, 54 Miss. 363; 28 Am. Rep. 352; *Winbigler v. Los Angeles*, 45 Cal. 36. But it is urged that a different rule prevails in respect to cities and other public corporations, and that they are not such political divisions of a state as to entitle them to immunity from damages for injuries such as complained of. It is not claimed that there is any statute making it the duty of a city of the third class, to which class the defendant belongs, to keep and maintain comfortable and safe city prisons, and no charter has been shown requiring this duty of the defendant. Where such duties are imposed by law upon municipal corporations, they then become liable when the duty enjoined relates to some act in the doing of which the city has some special interest apart from the public generally: *Sawyer v. Corse*, 17 Gratt. 230; 99 Am. Dec. 445; *Merrifield v. Worcester*, 110 Mass. 216; 14 Am. Rep. 592; *Emery v. Lowell*, 104 Mass. 13. But where such duties relate to acts which in their nature are for the benefit of the public as well as the citizens of the city, then no responsibility follows that can be enforced by private action: *Pfefferle v. Comm'rs of Lyon Co.*, 39 Kan. 432; *Gould v. Topeka*, 32 Id. 485; 49 Am. Rep. 496; *Washington v. Gregson*, 31 Kan. 99; *Bigelow v. Randolph*, 14 Gray, 541; *Hill v. Boston*, 122 Mass. 344; 23 Am. Rep. 332; *Eastman v. Meredith*, 36 N. H. 284; 72 Am. Dec. 362; *Hamilton v. Michels*, 7 Ohio St. 109; 3 Harrison, 121; *Finch v. Board*, 30 Ohio St. 37; 27 Am. Rep. 414; *Flori v. St. Louis*, 69 Mo. 341; 33 Am. Rep. 504; *Western College v. Cleveland*, 12 Ohio St. 375.

The distinction between an act done by a city in a public capacity and as a part of the political subdivisions of a state, and for an act done for its private advantage, and relating to things in which the state at large has no interest, is clearly defined, and is well recognized: *Western Sav. Soc. v. Philadelphia*, 31 Pa. St. 185; 72 Am. Dec. 780; *Maximilian v. Mayor of New York*, 62 N. Y. 160; 20 Am. Rep. 468; *Bailey v. Mayor of New York*, 3 Hill, 531; 38 Am. Dec. 669.

In *Hill v. Boston*, *supra*, it was said: "The examination of the authorities confirms us in the conclusion that a duty which is imposed upon an incorporated city, not by the terms of its charter, nor for the profit of the corporation, pecuniarily or otherwise, but upon the city as the representative and agent of the public, and for the public benefit, as by a general law

applicable to all cities and towns in the commonwealth, and a breach of which, in the case of a town, would give no right of private action, is a duty owing to the public alone, and a breach thereof by a city, as by a town, is to be redressed by prosecutions in behalf of the public, and will not support an action by an individual, even if he sustains special damage thereby."

This seems to be the current of authority everywhere, that a city, while acting as a political part of the state in suppressing crime and immorality, in the preservation of peace and good order, is not liable for its acts, although negligently committed by the city or its agents. And with the exception above noted, the city stands in the same catalogue with counties, townships, and other *quasi* municipal corporations in this respect, and is not liable to a personal action for injuries resulting from the enforcement of the public laws affecting the state at large.

It is therefore recommended that the judgment of the court below be affirmed.

By the COURT. It is so ordered.

JAILS NEGLIGENTLY KEPT. — Counties are not liable to the inmates of its jail, which is kept in such a condition that they are made sick: *Pfefferle v. Commissioners*, 39 Kan. 432; *Stuart v. Supervisors*, 83 Ill. 341; 25 Am. Rep. 397. Compare *Wehn v. Commissioners*, 5 Neb. 494, 25 Am. Rep. 497, as to whether a county is liable for a badly kept jail which is injurious to persons who are not inmates thereof. Compare also *Arkadelphia v. Windham*, 49 Ark. 139; 4 Am. St. Rep. 32, and cases collected in note 35; *Miller v. City of St. Paul*, 38 Minn. 134; *Chope v. Eureka City*, 78 Cal. 586; 12 Am. St. Rep. 113, and particularly the cases cited in note 114, 115.

STUDEBAKER v. JOHNSON.

[41 KANSAS, 326.]

SHERIFFS — IT IS DUTY OF SHERIFF, AT TIME OF MAKING SALE, TO COLLECT THE PURCHASE-MONEY, and where he fails to collect all of the purchase-money at a sale of real estate made by him on an order of sale, and afterward makes his return showing such sale to have been regular, and allows it to be confirmed, it is then too late for him to contradict the results of his return by showing that he has not received the purchase-money.

SHERIFFS — LIABILITY OF SURETIES ON OFFICIAL BONDS OF. — A sheriff sold real estate on an order of sale, but failed to collect all the purchase-money, and made his return. Before confirmation of the sale his term of office expired, and he was re-elected to the office, and the sale was

then confirmed, and the property conveyed to the purchaser. In an action against the sheriff and the sureties on his official bond for his second term, it was held that the sureties were not liable for the money which the sheriff failed to collect at such sale, which was during his first term of office, but that the sheriff himself was liable therefor independently of such bonds.

ACTION brought by the plaintiffs, Studebaker and others, against Johnson, as sheriff, and the sureties on his official bond, to recover a balance of the purchase-money of lands sold by Johnson, as sheriff, on an order of sale, and which balance he failed to collect at the time of sale. Other facts appear in the head-note and opinion. Judgment was rendered for the defendants, and the plaintiffs bring the case up for review.

R. S. Hanley, for the plaintiffs in error.

C. Angevine, for the defendants in error.

CLOGSTON, C. Plaintiffs contend that upon the findings of fact found by the court, they were entitled to a judgment against Johnson, as sheriff, and the sureties on his official bond. Whatever money was received by Johnson, as sheriff, under the order of sale was received during his first term of office. This money was duly paid over to the plaintiffs. It was his duty, however, at the time of making the sale, to collect all of the purchase-money; and where a sheriff fails to collect all of the purchase-money at a sale made by him under an order of sale, and afterward makes his return showing such sale to have been regular, and allows the same to be confirmed, it is then too late for him to contradict the recitals of his return: *Ferguson v. Tutt*, 8 Kan. 370; *Thompson v. St. Joseph etc. Building Ass'n*, 23 Id. 209. It being his duty to receive the money at the time of the sale, which was during his first term of office, the sureties on his second bond, executed afterward, would not be liable, although the sale was confirmed and a deed to the property made during the term of office for which they gave bond. Therefore, as to the judgment against the sureties on the second bond, or bond sued on, it must be affirmed.

Plaintiffs, however, insist that as their petition set forth the entire transaction, and showed the liability of the sheriff for the balance of the purchase-money, they are entitled to a judgment against Johnson, as sheriff, for the money. In this we think the plaintiffs are correct. He was liable to the plaintiffs

for the remainder of the purchase-money, and no cause of action would exist upon either bond unless the sheriff would have been liable had no bond been given. The sheriff's liability is not fixed by the bond, but he is liable for his official acts, or for the non-performance of such things as the law makes it his duty to do, independently of his bond: *Forsythe v. Ellis*, 4 J. J. Marsh. 298; 20 Am. Dec. 218. Johnson and his bondsmen are liable for his official acts during the first term of his office, and are liable for all money received by him during that term of office, and liable for all money which it was his duty to collect upon this sale; but as the record shows that there were some other matters which the court did not pass upon, and also shows that there were some other payments made to the plaintiffs in addition to the two hundred dollars received at the sale by the sheriff and turned over by him to the plaintiffs, and that a certain tax-sale certificate upon the property sold under the order of sale was assigned to them by the purchasers at the sheriff's sale, which was afterward redeemed, and the money received by the plaintiffs, which of course they would have to account for,—for these reasons a new trial must be ordered. It is therefore recommended that the judgment of the court below be reversed, and the cause remanded for a new trial, according to the views herein expressed.

By the COURT. It is so ordered.

SHERIFF'S RETURN IS CONCLUSIVE, as a general rule, between the interested parties and their privies: *Tullmann v. Davis*, 28 Ga. 494; 73 Am. Dec. 786; *Fairfield v. Paine*, 23 Mo. 496; 41 Am. Dec. 357; *Reynolds v. Ingersoll*, 11 Smedes & M. 249; 49 Am. Dec. 57; *Phillips v. Etsell*, 14 Ohio St. 240; 84 Am. Dec. 373; *McDonald v. Lecwright*, 31 Mo. 29; 77 Am. Dec. 631; *Stewart v. Stringer*, 41 Mo. 400; 97 Am. Dec. 278. A sheriff's return that he has collected a certain amount, or has taken a purchaser's bond for a certain amount is a perpetual bar to a second execution: *McGhee v. Ellis*, 4 Litt. 244; 14 Am. Dec. 124.

SHERIFFS. — AS TO WHAT DILIGENCE IS REQUIRED OF A SHERIFF in serving an execution, see extended note to *McDonald v. Nielsen*, 14 Am. Dec. 454, 457; extended note to *People v. Palmer*, 95 Id. 423-441; *Grabenheimer v. Budd*, 40 La. Ann. 107.

SHERIFF'S BOND DOES NOT INCREASE HIS LIABILITY, and he is no more liable for non-feasance nor misfeasance in his official duties with a bond than without one: *Forsythe v. Ellis*, 4 J. J. Marsh. 296; 20 Am. Dec. 218.

SURETIES, AS TO THEIR LIABILITY UPON SUCCESSIVE OFFICIAL BONDS, see extended note to *Owens v. Commonwealth*, 10 Am. St. Rep. 843-860.

CITY OF PARSONS v. LINDSAY.

[41 KANSAS, 386.]

SUNDAY IS DIES NON JURIDICUS, by common law, and all judicial proceedings which take place on that day, where the common-law rule is in force, are void.

SUNDAY. — VERDICT OF JURY MAY BE RECEIVED ON SUNDAY, but a judgment rendered on that day is void, and cannot be enforced or sustained.

COMMON LAW, AS MODIFIED by constitutional and statutory law, judicial decisions, and the condition and wants of the people, is enforced in Kansas in aid of the general statutes.

Kimball and Osgood, for the plaintiff in error.

H. G. Webb and E. C. Ward, for the defendant in error.

HORTON, C. J. This action was brought by W. H. Lindsay against the city of Parsons, for injuries resulting from a fall alleged to have been caused by a defective street crossing. The action was commenced on the eleventh day of October, 1879; a trial was had at the February term, 1880, of the district court, and judgment for the plaintiff for \$3,000 and costs; this judgment was reversed by this court at its July term for 1881, and the cause remanded for a new trial: 26 Kan. 426. Another trial was had before the court, with a jury, at a special term, commencing on the tenth day of November, 1883; a verdict was returned by the jury at three o'clock, p. m., on Sunday, the eleventh day of November, 1883, in favor of the plaintiff, and assessing his damages at \$1,000; on the same day the court discharged the jury, and rendered judgment in favor of the plaintiff, upon the verdict, for the sum of \$1,000, and costs taxed at \$565.50; on the same day a motion for a new trial was filed by the defendant, but the hearing of the motion was continued until the February term for 1884; on the 29th of February this motion was heard and overruled; the defendant excepted, and brings the case here; while pending in this court, W. H. Lindsay died, and the action has been revived in the name of Zerelda P. Lindsay, his administratrix.

The defendant alleges that the judgment is null and void, because it was pronounced on Sunday.

At the time the judgment was rendered, the law in force provided that the regular term of the court in the fall of 1883 should commence on the second Monday in November, which in 1883 came on the twelfth day of the month. It is well

settled that the verdict of a jury may be received on Sunday: *Stone v. Bird*, 16 Kan. 488; *Reid v. State*, 53 Ala. 402; 25 Am. Rep. 627. By some of the courts the reason assigned for the validity of such a verdict is, that the rendition and receiving are a work of necessity; by others, that it is merely a ministerial act, and not within the prohibition relating to judicial acts on Sunday: *Coleman v. Henderson*, Litt. Sel. Cas. 171; 12 Am. Dec. 290-295. The acceptance of a verdict, however, is not equivalent to a judgment, but the rendition of a judgment thereon is a judicial act.

By the common law, Sunday is *dies non juridicus*, and therefore all judicial proceedings which take place on that day, where the common-law rule is in force, are void. The common-law rule of the invalidity of judicial proceedings on Sunday is impliedly recognized by the provisions of our statute: *Blair v. Shew*, 24 Kan. 280; *Morris v. Shew*, 29 Id. 661 (472). The common law, as modified by constitutional and statutory law, judicial decisions, and the condition and wants of the people, is enforced in this state in aid of the general statutes: Comp. Laws 1885, c. 119, sec. 3.

After midnight of the tenth day of November, 1883, another day (Sunday) had commenced,—a day not judicial, and one on which the courts are not authorized to render judgments. The judgment being void, it cannot be enforced or sustained: *Blood v. Bates*, 31 Vt. 147; *Allen v. Godfrey*, 44 N. Y. 433; *Chapman v. State*, 5 Blackf. 111; *Arthur v. Mosby*, 2 Bibb, 589.

The judgment of the district court will therefore be reversed.

JUDICIAL ACTS DONE ON SUNDAY, what are valid and what not: See extended note to *Coleman v. Henderson*, 12 Am. Dec. 290; note to *Myers v. Meinrath*, 3 Am. Rep. 371, 372. A verdict may be received upon Sunday: *Reid v. State*, 53 Ala. 402; 25 Am. Rep. 627. Nor is an indictment void because it is dated on Sunday: *State v. Norton*, 16 Or. 105.

COMMON LAW OF ENGLAND, except so far as modified and abolished by statute, when applicable to the circumstances, is the law of Alabama: *Barlow v. Lambert*, 28 Ala. 704; 65 Am. Dec. 374; of Kentucky: *Lathrop v. Commercial Bank*, 8 Dana, 114; 33 Am. Dec. 481; of Louisiana, in criminal matters: *State v. McCoy*, 8 Rob. (La.) 545; 41 Am. Dec. 301; of Massachusetts: *Commonwealth v. York*, 9 Met. 93; 43 Am. Dec. 373; of Michigan: *Stout v. Keyes*, 2 Doug. (Mich.) 184; 43 Am. Dec. 465; *Lorman v. Benson*, 8 Mich. 18; 77 Am. Dec. 435; of Mississippi: *Vicksburg etc. R. R. Co. v. Patton*, 31 Miss. 156; 66 Am. Dec. 552; *Hemingway v. Scales*, 42 Miss. 1; 97 Am. Dec. 425; of New Hampshire: *State v. Moore*, 26 N. H. 448; 59 Am. Dec. 354; of Pennsylvania: *Pennock's Estate*, 20 Pa. St. 268; 59 Am. Dec. 718; of Texas: *Hyde v. State*,

16 Tex. 445; 67 Am. Dec. 630; of the United States: *Note to City Council v. Benjamin*, 49 Id. 618.

COMMON LAW. — Our ancestors adopted only that part of the common law which was applicable to their condition: *Harkness v. Sears*, 26 Ala. 493; 62 Am. Dec. 742. Statutes and constitutions must be construed with reference to common law, so as to make no change not expressly declared: *McGinnis v. State*, 9 Humph. 43; 49 Am. Dec. 697; *People v. Palmer*, 109 N. Y. 110; 4 Am. St. Rep. 423; *State v. Wilson*, 43 N. H. 415; 82 Am. Dec. 163.

COMMON LAW IS ORDINARILY PRESUMED TO EXIST in the states of the American Union: *Connor v. Traverick*, 37 Ala. 289; 79 Am. Dec. 58; *Blystone v. Burgett*, 10 Ind. 28; 68 Am. Dec. 658; *Owen v. Boyle*, 15 Me. 147; 32 Am. Dec. 143; *Houghtaling v. Ball*, 19 Mo. 84; 59 Am. Dec. 331; *Copley v. Sandford*, 2 La. Ann. 335; 46 Am. Dec. 548; *Thompson v. Munroe*, 2 Cal. 99; 56 Am. Dec. 318; *Dusen v. Adams*, 1 Ala. 527; 35 Am. Dec. 42. But there is no presumption that common law prevails in states in which civil governments were established prior to their becoming territories or states of the Union: *Buchanan v. Hubbard*, 119 Ind. 188.

BOWMAN v. PHILLIPS.

[41 KANSAS, 364.]

ATTORNEY AND CLIENT — VALIDITY OF CONTRACT FOR SERVICES OF ATTORNEY. — Attorneys at law may be employed to defend persons charged with crime, where the alleged offenses are charged to have been committed prior to the employment, and their services may also be engaged for future transactions, where no wrong is intended or contemplated. But a contract entered into by attorneys at law to defend persons for criminal offenses, which were in contemplation of all the parties to be committed in the future, is against public policy, and void, and compensation for services actually performed under such contract cannot be recovered.

ATTORNEY AND CLIENT — CONTRACT BY ATTORNEYS TO DEFEND FUTURE VIOLATIONS OF PROHIBITORY LIQUOR LAW IS VOID. — The plaintiffs, attorneys at law, entered into a contract with the defendants, who were engaged in the illegal sale of intoxicating liquors, whereby the plaintiffs agreed, for one year, for the monthly compensation of eighty dollars, payable on the first day of each month, to defend all cases brought against the defendants for violations of the prohibitory liquor laws. Services were actually performed by the plaintiffs under this contract, but they were paid for the first nine months only, and this action was brought to recover for their services for the last three months of the year. It was held that the contract was in contravention of public policy, and void, and that the plaintiffs could not recover an additional amount for their services which they actually performed under the contract, although such services may have been worth more than the amount claimed for the entire year's work.

CONTRACTS. — AS BETWEEN ORIGINAL PARTIES AND ALL PARTIES *IN PARI DELICTO*, the courts will not enforce illegal contracts, nor any supposed rights founded thereon, but will leave the parties and those in *pari delicto* where they find them, and will leave each in possession of what he has already obtained.

C. S. Bowman, Charles Bucher, and J. W. Ady, plaintiffs in error, for themselves.

Greene and Shaver, for the defendants in error.

VALENTINE, J. This action was commenced by C. S. Bowman and Charles Bucher, partners as Bowman and Bucher, and J. W. Ady, against W. H. Phillips, James L. Serviss, G. W. Rogers, and George E. Clark, to recover from the defendants the sum of \$240, alleged to be due for professional services rendered by the plaintiffs as attorneys and counselors at law. The case was tried before the court without a jury, and judgment was rendered in favor of the defendants and against the plaintiffs for costs; and the plaintiffs, as plaintiffs in error, bring the case to this court for review.

It appears that on May 5, 1883, a society existed at Newton, Kansas, composed of the defendants and others, known as the Saloon and Druggists' Protective Association of Newton, Kansas. The members of the association were principally saloon-keepers, and were engaged in selling intoxicating liquors in violation of the prohibitory liquor law; and the principal object of the association was to frustrate the law to the extent of evading all punishment for its violation. The plaintiffs in this case had full knowledge of all these things. On that day the plaintiffs and the defendants, with a few others, entered into the following written contract, to wit:—

NEWTON, KANSAS, May 5, 1883.

We, the undersigned business men of the city of Newton, agree to pay Messrs. Bowman and Bucher and J. W. Ady the sum of eighty dollars per month, on the first day of each month, for the period of one year from May 1, 1883, eighty dollars to be paid on the execution hereof; said payments to be made in consideration of the services herein agreed to be rendered.

We, the undersigned attorneys at law, agree to defend all cases that may be brought against George E. Clark, James Serviss, W. H. Phillips, J. E. Marti, J. H. Gray, J. H. Pappé, O. S. Bassett, E. Wetzel, and any others who may become members of the Saloon and Druggists' Protective Association of Newton, Kansas, or any person in business with either of them, as clerk, partner, or otherwise, for a violation of the prohibitory liquor laws of the state of Kansas, and to accept as full compensation for our services the sums hereinbefore stipulated to be paid. This is not to include the necessary ex-

penses or outlays on our part, should such be necessary, but only fees for professional services. Executed in duplicate.

BOWMAN AND BUCHER.

J. W. ADY.

JAMES L. SERVISS

W. H. PHILLIPS.

J. H. PAPPE.

J. E. MAETI.

L. H. CRAFTS.

GEORGE E. CLARK.

G. W. ROGERS.

. Septeml

Afterward, and within one year thereafter, various criminal prosecutions were instituted and conducted against the several members of the aforesaid Saloon and Druggists' Protective Association for violation of the prohibitory liquor law, and the plaintiffs in this action, as attorneys and counselors at law, defended them. Also during that year, and for the services of the plaintiffs for the first nine months thereof, the members of said association paid to the plaintiffs the sum of \$720, leaving, as the plaintiffs claim, still due to them on the aforesaid contract, and for their services for the last three months of the aforesaid year, the sum of \$240, for which sum they brought this action. It is stated in the briefs of counsel that the court below decided this case upon the theory that the aforesaid contract was in violation of public policy, and therefore void; while the plaintiffs claim that the contract is not in violation of public policy, nor void for any other reason; and they further claim that even if the contract is void, still that they alleged enough in their petition and proved enough on the trial to enable them to recover in the action as upon an implied contract for the actual services which they in fact performed. They certainly proved that the services which they actually performed were worth more than \$960, which is all that they claim for the entire year's work.

We think the contract is against public policy, and void. Of course attorneys at law may be employed to defend persons charged with crime, where the alleged offenses are charged to have been committed prior to the employment. An attorney's services may also be engaged for future transactions, where no wrong is intended or contemplated; and in all cases good faith and innocence will be presumed until the contrary appears. Also, where a contract is not in violation of public policy, nor in any matter tainted with immorality or illegality, and services are performed or benefits conferred under it, but the contract is void because of some want of power in one

or both the parties to make it, or void because of some irregularity in its execution, a contract will be implied and a promise assumed that the party benefited shall pay for all benefits which he has actually received under the void contract. Or if no contract is expressly made, but services are nevertheless performed or benefits actually conferred, with the knowledge and consent of the other party, and not as a gratuity, which services or benefits are in and of themselves innocent and proper, a contract and promise will be implied to pay for all the benefits actually received. But none of these cases is the present case. In the present case it was future wrongs and violations of law that were contemplated when this contract was executed, and it was future wrongs and violations of law that were to furnish the foundation for the plaintiffs' services, and the foundation for their compensation; and except for these contemplated future wrongs and violations of law, the contract would never have been made. This contract was tainted at its inception with these future, intended, and contemplated violations of law. Of course the plaintiffs, when they entered into the contract, did not intend to perform services different from services which may rightfully and legally be performed under a contract made for similar services after the violations of the law have actually occurred; and the plaintiffs in rendering their services under this contract did not render any services except such as they might have legally and rightfully rendered under a contract made after the violations of the law had actually taken place; but these things are not the things which render the contract in this case objectionable. The wrong on the part of the plaintiffs consisted simply in entering into a contract to defend persons for criminal offenses, which were in contemplation of all the parties to be committed in the future. This was a virtual encouragement of the defendants to violate the law. And surely the defendants expected by future violations of the law to furnish to the plaintiffs a sufficient amount of work to make the plaintiffs earn the agreed compensation. And in all probability the defendants also expected to realize a sufficient amount of profits out of their illegal and interdicted traffic to pay the plaintiffs and have something left. It was evidently considered by the parties as a mere sharing of the profits. The evidence tends to show that the defendants employed the plaintiffs in advance, because they believed that by so doing they could better evade the prohibitory liquor law, and could

obtain the services of the plaintiffs at a cheaper rate, provided they continued to carry on their illegal traffic. If the plaintiffs had refused to enter into such a contract, possibly the defendants would have closed their illegal business at once. What operated upon the minds of the plaintiffs to enter into this contract in advance of the commission of the contemplated offenses is not shown, but it is open to the supposition that they may have believed that if they did not enter into this contract the defendants would close their illegal business, or at least would not commit so many violations of law, and thereby would render the plaintiffs' services and their compensation correspondingly lighter. The defendants by this contract agreed to pay the plaintiffs eighty dollars per month, and they did in fact pay them that amount for the first nine months of their employment, and failed to pay them only for the last three months. It must also be remembered that the plaintiffs in this action are attorneys and counselors at law. They belong to a class of persons who are authorized and licensed under the laws of Kansas to assist the courts in the administration of justice and in enforcing the laws. Now, is it proper for such persons to say to persons who are contemplating the commission of crime: "If you commit the crime, we will defend you, and are ready now to enter into a contract for that purpose"? Attorneys at law, above all others, should refrain from doing anything which might seem to encourage a violation of the laws. We know of no authorities directly and precisely in point of the questions involved in this case, but we cite the following as giving support to the views herein expressed: *Treat v. Jones*, 28 Conn. 334; *Arrington v. Sneed*, 18 Tex. 135; *Hayes v. Hayes*, 8 La. Ann. 468; 3 Am. & Eng. Ency. of Law, 869, 875, 886, and cases there cited; 7 Wait's Actions and Defenses, c. 31; Greenhood on Public Policy, parts 11, 13.

As above stated, we think the contract in question in this case is void, for the reason that it contravenes public policy; and we also think that the plaintiffs cannot recover for their services which they actually performed under the contract, and this for the same reason. As between the original parties and all persons *in pari delicto*, the courts will not enforce illegal contracts, nor any supposed rights founded upon them, but will leave the parties and those *in pari delicto* just where they find them, and leave each in the possession of just what he has already obtained. So much of the contract or its fruits

as has already been executed, performed, or vested, the courts will permit to stand, but whatever remains to be executed or performed or to become vested, the courts will not enforce. In the present case, the plaintiffs will retain all the money which they have received under the void contract without the defendants having any action to recover it back, and the defendants will retain all the benefits resulting from the services of the plaintiffs which have already been rendered under the void contract, without the plaintiffs having any action to recover for the value of such services. Indeed, except for the contract, there might never have been any necessity for the performance of any such services, for without the encouragement given by the contract to the defendants they might never have violated any of the laws of Kansas.

We think the decision of the court below is correct, and its judgment will be affirmed.

WHAT CONTRACTS OF ATTORNEYS ARE VOID AS AGAINST PUBLIC POLICY. — Agreements contrary to public policy in general constitute the subject of a note to *Parsons v. Trask*, 66 Am. Dec. 506-514; see also *Bowman v. General*, 19 La. Ann. 328; 92 Am. Dec. 537; *Patton v. Gilmer*, 42 Ala. 543; 94 Am. Dec. 665; *Rhodes v. Neal*, 64 Ga. 704; 37 Am. Rep. 93; *Pickett v. School District*, 25 Wis. 551; 3 Am. Rep. 105; *Atcheson v. Mallon*, 43 N. Y. 147; 3 Am. Rep. 678; *Chicago Gas Light Co. v. Gas Light Co.*, 121 Ill. 530; 2 Am. St. Rep. 124; *Berlin Machine Works v. Perry*, 71 Wis. 475; 5 Am. St. Rep. 226; *Smith v. Du Bose*, 78 Ga. 413; 6 Am. St. Rep. 260. It is an established general principle that contracts having for their subject-matter any interference with the due enforcement of the laws are against public policy, and are therefore void. The law guards with jealousy every avenue to its courts of justice, and strikes down everything in the shape of a contract which may afford a temptation to interfere with its due administration: *Ormerod v. Dearman*, 100 Pa. St. 561; 45 Am. Rep. 391. And, as truly observed in the principal case, especially should attorneys at law, above all others, refrain from doing any act, or from entering into any contract, which might seem to encourage a violation of the laws. And where the plaintiff, an attorney at law, instigated the defendant, with others, to engage in a riot, and promised to defend them if they were prosecuted, and the defendant was prosecuted, and employed the plaintiff to defend him, and the plaintiff afterwards sued him for his services, it was held that he could not recover. The unlawfulness of the acts which the plaintiff procured the defendant to perform vitiated the whole contract between the parties, and on grounds of public policy the plaintiff should not be permitted to recover: *Treat v. Jones*, 28 Conn. 334. Nor will the law permit a recovery upon a contract entered into between attorney and client, the consideration of which was such advice to a party as was calculated to enable, if not to induce, him to elude the process of the law, and such advice to the officer intrusted with the execution of process as was calculated to induce him to violate his duty. And although legal services were rendered under the contract, yet, being mixed with others so contrary to public policy, the law will not imply a promise to pay for them: *Arrington v. Sneed*, 18 Tex. 135.

Among contracts which tend to interfere with the due administration of justice, and are therefore held to be void, as contrary to public policy, is an agreement by an attorney at law to procure for a contingent fee the quashing of a criminal prosecution. The stifling of a prosecution for a criminal offense, even where it is a mere misdemeanor, and of such a character as to be within the control of the parties, is not a proper subject of a bargain for a fee: *Ormerod v. Dearman*, 100 Pa. St. 561; 45 Am. Rep. 391; and see *Town of Hinesburgh v. Sumner*, 9 Vt. 23; 31 Am. Dec. 599, and note 600. And generally, all contracts to change the course of trials, or the effects of trials, whether to obtain the liberation of a prisoner by money to the jailer, or to obtain a pardon by the use of money directly or indirectly, must be deemed void. Thus it is held that a contract founded upon a promise or engagement to procure signatures, and obtain a pardon from the governor, for one convicted of a criminal offense and sentenced to punishment, is unlawful, and cannot be enforced by action: *Hatzfield v. Gulden*, 7 Watts, 152; 32 Am. Dec. 750; and see *Buck v. First National Bank*, 27 Mich. 293; 15 Am. Rep. 189. Yet there is held to be nothing unlawful or opposed to public policy in simply employing a person to endeavor, by proper means, to secure a pardon: *Chadwick v. Knox*, 31 N. H. 226; 64 Am. Dec. 329; *Formby v. Pryor*, 15 Ga. 258; and from the mere fact of an attorney at law being employed to solicit the pardon of a convict, and if successful, to be paid a stipulated sum for his services, it is not to be legally inferred that an unlawful course of conduct was intended. It may, for instance, be proper, and often expedient, that an attorney at law should examine the case upon which the conviction was based, to see whether, notwithstanding the final judgment of the law, the case may not be of such a nature as to justify the exercise of the extraordinary power of pardon. He may direct investigations to the discovery of facts bearing upon the question of guilt, not discoverable at the time of the trial, and the attention of prosecuting officers, and of the judge who tried the cause, may be directed to newly discovered facts, or to any of the circumstances of the case, and their recommendation in favor of a pardon may be sought, and for such services the attorney may recover the sum agreed to be paid: *Moyer v. Cantieni*, 41 Minn. 240.

A contract with an attorney to procure, or endeavor to procure, the passage of an act of the legislature, is void, as being inconsistent with public policy and the integrity of our political institutions: *Clippinger v. Hepbaugh*, 5 Watts & S. 315; 40 Am. Dec. 519, and note 524. So where an action was brought by an attorney to recover compensation for his services before the war department in procuring the discharge of a drafted man, it was held that the contract was against public policy, and void, whether the compensation for the services was fixed or contingent, and there could be no recovery: *Bowman v. Coffroth*, 59 Pa. St. 19. So an agreement to take charge of a claim before Congress, and to prosecute it as agent or attorney for the claimant, by lobby service, is void: *Trist v. Child*, 21 Wall. 441. And it has been held that all contracts for the collection of claims against the United States, whether the claims are to be prosecuted before the courts, before Congress, or the legislature, or before any of the executive departments, for a compensation contingent upon success, are clearly against public policy, and, moreover, are in contravention of the act of Congress to prevent frauds upon the treasury (10 U. S. Stat. at Large, 170, sec. 1), and are therefore void: *Jones v. Blackledge*, 9 Kan. 562; 12 Am. Rep. 503. But a contract for purely professional services, such as draughting a petition for an act, attending to the taking of testimony, collecting facts, preparing arguments, and submitting them to

the committee, or other proper authority, etc., is clearly valid: *Trist v. Child*, 21 Wall. 441, 445. And it is further held by the supreme court of the United States that there is nothing illegal, immoral, or against public policy, in an agreement by an attorney at law to present and prosecute claims against the United States, either at a fixed compensation, or at a reasonable percentage on the amount recovered: *Wright v. Tebbitts*, 91 U. S. 252; *Stanton v. Embrey*, 93 Id. 548; *Taylor v. Benise*, 110 Id. 42; *Central R. R. & Banking Co. v. Petrus*, 113 Id. 116; and see *Manning v. Sprague*, 148 Mass. 18.

Public policy is interested in maintaining the family relation, and where differences arise which threaten a disruption of such relation, public welfare and the good of society demand a reconciliation, if practicable or possible. Hence, a contract by a wife to pay her solicitors one half of the alimony to be recovered by her in a suit for divorce, as compensation for their services in such suit, is void as against public policy, it being for the interest of the solicitors, under their contract, that there should be no reconciliation: *Jordan v. Westerman*, 62 Mich. 170; 4 Am. St. Rep. 836. So an attorney is required to act honestly towards his client, and where a litigant induces the opposing attorney to be unfaithful to his client, by paying him a sum of money, which the attorney agrees to return on the happening of a certain event, the agreement is illegal and void, and will not be enforced, even on the happening of the event: *Duke v. Patterson*, 4 Hun, 558.

It is likewise the policy of the law to discourage litigation and to encourage settlements of lawsuits, and to uphold purity and justice in the administration of remedies in the courts of justice. And it is held to be clearly and directly in contravention of such policy for an attorney to enter into an agreement to pay any judgment that should be finally rendered against his client in a certain suit, in consideration that the latter would appeal the case, and pay the attorney a fee for conducting the same. Such contract is void as against public policy, and cannot be enforced by either attorney or client: *Adye v. Hanna*, 47 Iowa, 264; 29 Am. Rep. 484. And, generally, contracts which partake of the evils of maintenance and champerty will be held void, as being opposed to sound public policy. But it is an essential element of a champertous contract that the attorney is to contribute to the expenses of the litigation, for a part of the thing in dispute or some profit out of it: *Duke v. Harper*, 66 Mo. 51; 27 Am. Rep. 314; *Martin v. Clarke*, 8 B. L. 339; 5 Am. Rep. 586; *Rust v. Larue*, 4 Litt. 417; 14 Am. Dec. 172; *Arden v. Patterson*, 5 Johns. Ch. 44; *Jewell v. Neidy*, 61 Iowa, 299; *Park Commissioners v. Coleman*, 108 Ill. 591; or he is to look alone to that which might be recovered for his compensation: *Ackert v. Barker*, 131 Mass. 436; *Belding v. Smythe*, 138 Id. 530. And where the right to compensation is not confined to an interest in the thing recovered, but gives a right of action against the party, though pledging the avails of the suit, or a part of them, as security for payment, the agreement is not champertous: *Scott v. Harmon*, 109 Id. 237; 12 Am. Rep. 685; *Tapley v. Coffin*, 12 Gray, 420; *Christie v. Sawyer*, 44 N. H. 298; *McPherson v. Cox*, 96 U. S. 404; *Anderson v. Radcliffe*, 111 B. & E. 806, 817. So an agreement merely that the attorney is to receive, as compensation for his services, a portion of the subject-matter of the litigation, is not champertous in Missouri: *Duke v. Harper*, 66 Mo. 51; 27 Am. Rep. 314. So in New Jersey, an attorney, as distinguished from an advocate, may lawfully contract for a certain percentage of the sum to be recovered, as remuneration for his services: *Schomp v. Schenck*, 40 N. J. L. 195; 29 Am. Rep. 219. And a contract by which the attorney agrees to give his services without charge if the suit should not be successful, and the

client agrees to furnish evidence and pay all actual costs, and pay large and liberal fees to the attorney if successful, is not champertous, nor void for maintenance: *Blaisdell v. Ahern*, 144 Mass. 393; 59 Am. Rep. 99. The later doctrine upon the subject is, that the mere agreement for a contingent fee does not fall within any of the rules of champerty; nor is it generally regarded to be unlawful for an attorney to carry on a suit for another for a percentage or share of the thing to be recovered, unless he assumes the risks of the litigation by relieving or indemnifying his client from all costs and expenses of the same: *Aultman v. Waddle*, 40 Kan. 195; *Moody v. Harper*, 38 Miss. 601; *Knadler v. Sharp*, 36 Iowa, 232; *Walsh v. Shumway*, 65 Ill. 471; *Moses v. Bagley*, 55 Ga. 283; *Ballard v. Carr*, 48 Cal. 74; *Martin v. Feeder*, 20 Wis. 466; *Allard v. Lamiranda*, 29 Id. 502; *Bentinck v. Franklin*, 38 Tex. 458; *Hall v. Crouse*, 13 Hun, 562; *Manning v. Sprague*, 148 Mass. 18; *Wright v. Tebbitts*, 91 U. S. 252; *Ware v. Russell*, 70 Ala. 174; 45 Am. Rep. 82; *Gilman v. Jones*, 87 Ala. 691; *Richardson v. Rowland*, 40 Conn. 565.

DURKEE v. GUNN.

[41 KANSAS, 496.]

AGENCY — CONTRACT TO ADVERTISE AND SELL REAL ESTATE, CONSTRUCTION OF. — A written contract entered into between a real estate agent and the owner of land, the former agreeing to advertise and sell the land, but to receive no compensation for his services excepting a share in the surplus or profits arising from the proceeds of the sale, is a contract of agency, and not of partnership.

CONTRACTS — DAMAGES RECOVERABLE ON REVOCATION OF. — Where an agent has a contract with his principal to sell certain lands, to be disposed of within a time limited, and he is to receive as compensation for his services only a share of the profits arising from the proceeds of the sale, and in performance of such contract he renders services for several months, expending time and money, and the principal then revokes the contract without any reason or excuse, and refuses to permit him to further perform, the agent is entitled to recover such compensation in damages as would be equal in amount to his share of the profits which would have resulted had the lands been sold by him.

ACTION by W. C. Gunn against Durkee and Stout to recover damages for an alleged breach of contract by the defendants. On June 1, 1886, the defendants, who owned certain real estate, entered into a written contract with the plaintiff and one Marr, then doing a real estate business under the style of Gunn and Marr, by which Gunn and Marr agreed to offer the land for sale, thoroughly advertise and press the sale at their own expense, and all profits arising over and above a certain amount per acre to be equally divided between the parties to the contract, which was to continue until October 1, 1887. The firm of Gunn and Marr dissolved July 23, 1886, by Marr retiring, and Gunn buying out his interest in the business, including

the interest in the land contract, and Gunn continued the business of real estate agent, and also the performance of the contract. In February, 1887, and after the land had greatly increased in value, the defendants revoked Gunn's agency, and refused to permit him to perform the contract, and Gunn brought this action. Other facts appear in the opinion. The findings of the court and the judgment were for the plaintiff, and the defendants bring up the case for review.

J. D. McCleverty, for the plaintiffs in error.

Ware, Biddle, and Cory, for the defendant in error.

HORTON, C. J. It is claimed by Messrs. Durkee and Stout, who entered into a contract with Messrs. Gunn and Marr on June 1, 1886, that the dissolution of the firm of Gunn and Marr terminated their agency; that Marr, the retiring member of the firm, had no authority to sell or transfer his interest or the interest of the firm in the contract of June 1, 1886, to Gunn; therefore, that as no new contract was made in writing by Gunn, he could not recover as agent or otherwise for any damages or services subsequent to July 23, 1886, the date of the dissolution. Against this it is urged that Gunn, from the findings of the trial court, as continuing partner, succeeded by the terms of his agreement with Marr to all the rights of the firm, if Messrs. Durkee and Stout recognized or approved of his agency after the dissolution of the firm. It is held by a number of cases that an assignment by one partner of all his interest in the partnership is *ipso facto* a dissolution of the partnership, though the assignment is made to another partner: *Marquand v. Mfg. Co.*, 17 Johns. 525; *Edens v. Williams*, 36 Ill. 252; *Rogers v. Nichols*, 20 Tex. 719. But in *Taft v. Buffum*, 14 Pick. 322, it is held that an assignment by one partner to another of his interest in the partnership property is not *ipso facto* a dissolution of the partnership. Whether it so operated depended on its terms as to the intention of the parties: See also *Monroe v. Hamilton*, 60 Ala. 226; *Buford v. Neely*, 2 Dev. Eq. 481. The findings of the trial court, however, show that the assignment from Marr to Gunn was recognized by Durkee and Stout after it was made. Marr does not claim any interest in the contract, either for himself or for the old firm of Gunn and Marr. After the dissolution, on July 23, 1886, Gunn continued to act under the contract of June 1st, with the knowledge and without the objection of

Durkee and Stout. This is shown by the following findings:—

“7. The partnership of Gunn and Marr was dissolved July 23, 1886, by E. D. Marr retiring, W. C. Gunn buying out the interest of said Marr in the business, including his interest in this contract.

“8. An extended notice of the dissolution of this firm, with the purchase of Marr's interest in the business, and that W. C. Gunn would continue the business, was given in the Fort Scott Daily Monitor of July, 1886, which paper was taken by both defendants.

“9. Immediately after such notice of dissolution, the local notice above referred to (in the fourth finding) was signed by W. C. Gunn instead of Gunn and Marr, and said Durkee and Stout, particularly W. H. Stout, was in the habit of meeting said Gunn in a business way as often as once or twice a month.

“10. Said defendants knew of the dissolution of the firm of Gunn and Marr, and that W. C. Gunn was conducting the business of Gunn and Marr, and was acting instead of Gunn and Marr in doing whatever he did under this contract.

“11. Said Durkee and Stout never objected or made any question as to the right of said W. C. Gunn to act in the place of Gunn and Marr.”

In our opinion, on account of the conduct and acts of all the parties, the rights, duties, and liabilities of W. C. Gunn were the same after dissolution as before, excepting that the contract of June 1, 1886, was to be fully carried out on the part of Gunn and Marr by Gunn only. Therefore the point made that the contract of June 1st was in its nature personal only, and hence not assignable, need not under the findings be discussed.

We have examined the record, and think that the reasonable interpretation of the evidence of the plaintiff below, and the fair inferences therefrom, fully support the findings of fact.

As neither Messrs. Gunn and Marr nor the continuing member of the firm, W. C. Gunn, had any interest in the land described in the contract, but only shared in the surplus or profits, the agency of Gunn was revocable: *Hawley v. Smith*, 45 Ind. 183. But although Messrs. Durkee and Stout had the power to annul the contract and refuse to permit Gunn to act, yet when they so refused without any just reason or excuse,

after having recognized Gunn as the continuing member of the firm, they were liable to him for all damages resulting proximately from the breach of the contract.

The court allowed Gunn as his measure of damages one half of what the land would have sold for at the commencement of his action above the price Messrs. Durkee and Stout agreed to accept for the land, as stated in the contract. It is contended that the rule followed was erroneous. The findings of the court show:—

“17. That on February 23, 1887, when this suit was brought, said land taken as a whole would have sold out in lots at the rate of \$750 per acre.”

“13. That by reason of a controversy in the city over bonds voted to the K. N. & D. R. R., and for other reasons, the real estate market was very dull in Fort Scott during July, August, September, October, November, and December, 1886, and in January, 1887.

“14. That W. C. Gunn, for the purpose of disposing of this piece of land and other land which he had for sale, and for the purpose of ‘booming’ the city, expended considerable sums of money in advertising the city during the latter part of 1886, and about January 1, 1887, took a very active part in getting up a syndicate (for the purpose of buying and selling land and advertising the city), composed in part of foreign capitalists, and was mainly instrumental in raising the stock of the syndicate,—taking ten thousand dollars of stock in the same.

“15. That mainly by the formation of said syndicate, real estate in the city of Fort Scott during the early part of February, 1887, suddenly increased in value,—almost double.”

We think that Gunn, owing to the wrongful revocation of his agency by Messrs. Durkee and Stout in the early part of February, 1887, was entitled to recover such compensation or damages as would be equal in amount to his share of the profits which would have resulted had the lands been sold by him: *Hawley v. Smith, supra*. This is what he really recovered. Therefore no erroneous rule was followed, nor are the damages allowed excessive. Messrs. Durkee and Stout cannot take advantage of their own wrongful acts, and as Gunn was prevented by them from performing a contract, his remedy is the same as if he had performed.

We perceive no error in the record, and therefore the judgment of the district court will be affirmed.

CONTRACT — CONSTRUCTION OF. — An agreement whereby a manufacturer bound himself to furnish M. with machinery at thirty per cent discount from catalogue prices, which M. should sell in the course of business, seven tenths of the purchase price to be paid to the manufacturer and three tenths to M., the manufacturer to ship the machines directly to purchasers, is not a contract of agency; and M. could not, upon a breach of such contract, sue *quantum meruit* for services, but must sue for damages for a breach of the special contract: *Nagle v. McNorton*, 65 Miss. 197.

MISSOURI PACIFIC RAILWAY CO. v. NEISWANGER.

[41 KANSAS, 621.]

RAILROAD COMPANIES — NEGLIGENCE — LIABILITY FOR UNSAFE CONDITION OF RAILWAY STATION-GROUNDS. — The plaintiff, an intending passenger on one of the defendant's trains, purchased a ticket, and awaited the arrival of the train at the defendant's station. The train was delayed, and the plaintiff waited for its arrival until after dark. The station platform was about three feet from the ground, without artificial lights of any kind, and there were no water-closets or other like conveniences in or about the station-house. It became necessary for the plaintiff to retire from the station-house and from the platform, and in attempting to step from the platform to the ground, which she believed to be on the same level at the place where she made the attempt, she lost her balance, and fell, sustaining the injuries for which she brought this action. The jury found a verdict for the plaintiff, and against the defendant, for damages; and it was held that the questions as to whether the defendant was guilty of negligence, and whether the plaintiff was guilty of contributory negligence, were proper questions for the jury, and that their verdict upon these questions was conclusive; and also, that evidence tending to show that other persons had fallen from the same portion of the platform where the plaintiff fell, and under circumstances of a similar character, was properly admitted in evidence on the trial.

EVIDENCE — DEPOSITIONS. — IT IS NOT ERROR TO PERMIT DEPOSITION TO BE READ IN EVIDENCE, though taken in the same city where the trial was had, and only one day before the trial, and without any showing being made that the oral testimony of the witness could not be procured, where no objection was urged against it for these reasons, and the reasons given for the objection that was urged against the deposition were insufficient.

ACTION to recover damages for personal injuries. The opinion states the case.

Waggener, Martin, and Orr, for the plaintiff in error.

A. H. Ellis, and Walrond, Mitchell, and Heren, for the defendant in error.

VALENTINE, J. This was an action brought in the district court of Osborne County by Nancy J. Neiswanger against the Missouri Pacific Railway Company, to recover for personal

injuries alleged to have been caused though the negligence of the defendant at the city of Beloit, Kansas. The case was tried before the court and a jury, and the jury rendered a general verdict in favor of the plaintiff and against the defendant, and assessed her damages at five thousand two hundred dollars. The jury also made numerous special findings upon interrogatories submitted to them by the court at the request of the defendant. Judgment was rendered in favor of the plaintiff, and against the defendant, for five thousand two hundred dollars, and the defendant, as plaintiff in error, brings the case to this court, and asks for a reversal of such judgment.

The facts of this case appear to be substantially as follows: On May 6, 1886, and at about five o'clock, P. M., the plaintiff, who resided at Osborne, and who was on her way home, arrived by way of the Solomon branch of the Union Pacific railway at the city of Beloit. She immediately went to the depot or station of the defendant at that place. This depot or station is situated on the south side of the railway tracks, which at that place run east and west. The station-house is a frame building, and has a platform all around it from ten to fourteen feet wide. This platform is about three feet high from the ground. At the west end thereof, and near the northwest corner, there are steps, four or five in number, and from six to eight feet in length, to enable persons to pass from the ground to the platform, and from the platform to the ground. At the east end of the platform there is an inclined plane of gradual descent from six to ten feet wide, extending eastwardly about fifty feet, intended, among other things, for the same purpose as the steps at the west end. The ladies' waiting-room is near the middle of the building, with a door on the north side opening from the north platform. When the plaintiff arrived at the depot, she inquired of the company's agent when the next train going west to Osborne would leave, and he told her that it would leave at 9:20, P. M. Shortly afterward her husband arrived from the west to meet her, and to return home to Osborne with her. He purchased tickets for himself and her to Osborne, and they checked their baggage to that place. They then left the depot, and took a walk through the city, returning to the depot "about dusk," where they remained waiting for their train. The plaintiff at each time in going to and from the station passed over the steps at the northwest corner of the station platform. The train on which the plaintiff expected to travel in going from Beloit to

Osborne did not arrive at 9:20, and it would seem that no one knew when it would arrive; so the plaintiff, with several other passengers, continued to remain at the station waiting patiently for the train to come. At about eleven o'clock that night it became necessary for the plaintiff to retire, and as there were no water-closets or other accommodations of that kind in or about the depot-building, it became necessary for her to leave the building, which she did. Two other ladies accompanied her, one with whom she was slightly acquainted, but who had no more knowledge of the depot and its surroundings than the plaintiff had, and the plaintiff virtually had none. The other woman was an entire stranger to the plaintiff, but she had some slight knowledge of the place; but the plaintiff at the time did not know it. No inquiry was made of any agent of the railway company, nor was any such agent present or in sight, and the ticket-office was closed. The women passed out of the door of the ladies' waiting-room onto the north platform, the plaintiff being in the lead. At the west end of the platform and of the depot was a public street. Hence they passed eastwardly to the east end of the platform. There were no artificial lights at this place, and indeed none outside of the depot-building, and none in the building except some dim lights. There was just enough natural light, however, outside of the building to enable the plaintiff to see the platform and to see the ground, and she could distinguish the one from the other. When she arrived at the platform at the east end of the building, she then walked a few steps southwardly, and then again eastwardly. She saw the east edge of the platform and the ground east of the same, and believing that they were upon a level, stepped from the platform, intending to place her foot upon the ground, but the ground being three feet below, she lost her balance, and fell to the ground, causing the injuries of which she now complains. The two ladies were still with her, and just behind her when she fell. This fall occurred about five feet south of the inclined plane above mentioned. The plaintiff had never before been at this part of the platform. She was picked up and carried into the depot-building, where she remained until the train arrived, which was shortly after twelve o'clock that night. She was then placed upon the west-bound train, and taken to her home in Osborne. She was then between fifty-two and fifty-three years old. Afterward, and on August 9, 1886, she brought this action to recover damages for the injuries which

she received by falling from the depot platform as aforesaid.

It is claimed by the plaintiff in error, defendant below, that no cause of action was alleged or proved by the plaintiff below in this case. Now, if the facts as above stated constitute a cause of action, then we think a cause of action was both alleged and proved. The petition of the plaintiff below is in some particulars defective in not stating the facts constituting her cause of action in greater detail and with a more minute and circumstantial particularity; but the petition was not properly objected to or attacked for this reason. No motion was made to require the petition to be made more elaborate or more definite and certain, nor to require that any of its allegations should be made more specific and explicit; nor was it attacked by any written motion or objection, nor even by a demurrer. Under the circumstances, we think the petition was and is sufficient, provided the facts of the case as therein stated, and as developed by the evidence, are themselves sufficient to constitute a cause of action. Among the several allegations contained in the petition are the following: The plaintiff went to the defendant's depot as a passenger, and purchased a ticket. The platform at that place was three feet high; it was in the night and dark when the injuries occurred; no sufficient lights nor any information was furnished; the ticket-office was closed, and no agent of the defendant was present from whom any information could be obtained; and the defendant was negligent in not providing "suitable accommodations for passengers and others entitled thereto." The petition, in fact, alleged that the darkness was greater than the evidence showed it to be. The petition also alleged negligence generally on the part of the defendant, and that the plaintiff was without fault. The only question, then, is, whether the facts as alleged and proved and as above stated constitute a cause of action. The plaintiff in error, defendant below, claims that they do not, and this, for the reason that they do not show any negligence on the part of the defendant below, and do show culpable contributory negligence on the part of the plaintiff below. We think the plaintiff in error is mistaken. In our opinion, the defendant below was unquestionably guilty of culpable negligence, and we cannot say that the plaintiff below was guilty of any culpable contributory negligence, and the jury found that the defendant was guilty of culpable negligence, and that the plaintiff was not; and the

verdict of the jury upon these questions is conclusive: *McKone v. Mich. Cent. R. R. Co.*, 51 Mich. 601; 47 Am. Rep. 596; 13 Am. & Eng. R. R. Cas. 29; *Buenemann v. St. Paul etc. R'y Co.*, 32 Minn. 390; 18 Am. & Eng. R. R. Cas. 153, 155, note, and cases there cited; *Keeffe v. Boston etc. R. R. Co.*, 142 Mass. 251; 27 Am. & Eng. R. R. Cas. 137; *B. & O. R. R. Co. v. Rose*, 27 Id. 125, 130, note, and cases there cited; *Alabama etc. R. R. Co. v. Arnold*, 84 Ala. 159; 5 Am. St. Rep. 354; 30 Am. & Eng. R. R. Cas. 546, 555, note, and cases there cited; *Moses v. Louisville etc. R. R. Co.*, 39 La. Ann. 649; 4 Am. St. Rep. 231; 30 Am. & Eng. R. R. Cas. 556; *Bennett v. Louisville etc. R. R. Co.*, 102 U. S. 577; 1 Am. & Eng. R. R. Cas. 71; *Stewart v. International etc. R. R. Co.*, 53 Tex. 289; 37 Am. Rep. 753; 2 Am. & Eng. R. R. Cas. 497; *Cross v. Lake Shore etc. R. R. Co.*, 69 Mich. 363; post, p. 399; *St. Louis etc. R'y Co. v. Fairbairn*, 48 Ark. 491; *Patten v. Chicago etc. R'y Co.*, 32 Wis. 524; *Beard v. Conn. etc. R. R. Co.*, 48 Vt. 101; *Baltimore etc. R. R. Co. v. State*, 60 Md. 449; *Buffett v. Troy etc. R. R. Co.*, 40 N. Y. 168; *McDonald v. Chicago etc. R'y Co.*, 26 Iowa, 124; 95 Am. Dec. 114; *Martin v. Great N. R'y Co.*, 16 Com. B. 179; *Birkett v. Whitehaven J. R'y Co.*, 4 Hurl. & N. 729.

For a railway company to construct a platform around its station-house three feet high from the ground, inviting passengers and others to enter upon its premises, many of whom are strangers to that locality, and then to keep them waiting at that place for a delayed train from nine o'clock at night until after midnight, without water-closets or other such necessary accommodations, without lights for the platform, or any lights except some dim lights within the station-house, without guards or railing for the platform, and without information concerning the character of the premises, is certainly culpable negligence, as toward passengers who are not acquainted with the premises, and who are there waiting for such delayed train to arrive to carry them to their destination, and who in the mean time find it necessary to retire from the station-house and from the platform. But the defendant urges most strenuously that the plaintiff was guilty of culpable contributory negligence; and it cites various authorities, the most favorable of which to its side of the question are the following: *Reed v. R. & A. R. R. Co.*, 84 Va. 231; 33 Am. & Eng. R. R. Cas. 503; *Forsyth v. Boston etc. R'y Co.*, 103 Mass. 510. But upon reason and great weight of authority, we think the plaintiff was not guilty of any culpable contributory neg-

ligence: See the numerous cases above cited. Surely, as a question of law, we cannot declare that she was guilty of any such negligence, and the jury declared as a matter of fact that she was not. What more should she have done than she did? Should she have created a sensation by hunting for the secluded and possibly sleeping agent of the railway company to obtain a light or to procure information, or when she arrived at the edge of the platform should she have got down upon her knees and felt with her hands to ascertain whether the platform and the ground were upon the same level or not? The jury did not think that she was required to do these things, and their verdict is final.

It is claimed, however, that she ought to have known that the platform was elevated very much above the level of the ground, for the reason that when she first arrived at the station it was still daylight. It appears that prior to the accident she went to and from the platform, but only to and from the west end; and it does not appear that she ever saw or was ever at the east end until the very moment when the accident occurred; and it would seem that with her slight knowledge of the platform she should not be required always and necessarily, at her peril, to retain in her actual consciousness the exact condition of the entire platform, nor should she be so required, even if at some time prior to the accident she did have full and actual knowledge of the platform and its condition. At the time of the accident she saw the platform and saw the ground, and believed that they were upon the same level, and trusting to her senses and to her supposed perceptions, she stepped from the platform and fell, and the jury found that in doing so she was not guilty of any culpable contributory negligence, and their findings upon this subject must now be considered as conclusive: See the authorities above cited.

The plaintiff in error, defendant below, further claims that the court below erred in permitting testimony of two witnesses to be introduced showing that two other persons, a man and a woman, had also fallen from the same portion of the platform under circumstances of a similar character. Such evidence was competent: *City of Topeka v. Sherwood*, 39 Kan. 695, 696, and cases there cited; *Morse v. Minneapolis etc. R'y Co.*, 30 Minn. 466, 471, 472, and cases there cited; 11 Am. & Eng. R. R. Cas. 168, 172, 173, and cases there cited. Such evidence tended to show that the place was unsafe and dangerous: *Dis-*

trict of Columbia v. Armes, 107 U. S. 519, 524-526, and cases there cited.

There is a further objection urged against the testimony of one of such witnesses, to wit, Lydia S. Walrath. Her testimony was embraced in a deposition, and the objection now urged against the deposition is, that it was taken in the same city in which the trial was had, and only one day before the trial, and that no showing was made that the oral testimony of the witness could not be procured. No such objection as this was made in the court below, and probably the court below never considered or thought of any such objection. The only objection urged in the court below against the deposition as a whole was as follows: "Objection taken by defendant to the entire deposition, on the grounds that same is incompetent, irrelevant, and immaterial, and not within the issues in this case; and on the further ground that the same is hearsay in its character, and that no foundation has been laid for the evidence; also that it is too remote; also upon the ground that it does not appear from said deposition that the said defendant, or any of its agents, servants, or employees, had any notice or knowledge of the circumstances set forth in said deposition. Objection to the introduction of the deposition as a whole overruled, to which ruling of the court the defendant excepts."

If the objection which is now urged had been urged in the court below, it would have been error for the court below to have permitted any part of the deposition to be introduced in evidence; but no such objection having been urged in the court below, nor fairly covered by the objection that was urged, we cannot say that the court below committed any error in permitting a part of the deposition to be read in evidence. The grounds for the objection interposed in the court below are substantially the same as the defendant generally interposed where it objected to the testimony of witnesses, and the objection urged in the court below was evidently intended to apply only to the evidence as evidence embodied in the deposition, and not to the fact that the deposition was not filed in time, or that no showing was made that the oral testimony of the witness could not be procured. The part of the deposition which was read in evidence scarcely had any materiality in the case. The facts which it tended to prove were amply proved by other testimony. The testimony read from the deposition was to the effect that Mrs. Walrath had fallen when it was dark from the same place from which the plaintiff fell,

and it was introduced for the purpose of showing that such place was unsafe and dangerous; and taking the facts and circumstances of the case as they were unquestionably proved by the other evidence, we would think, as a matter of law, that the place where the plaintiff fell was, under the circumstances, unsafe and dangerous. Besides, the other evidence also proved that a woman whose name was not shown, but who was presumably Mrs. Walrath, fell from that place. But upon the objection made to the introduction of this deposition in evidence in the court below, we do not think that the court below erred in permitting a part of the deposition to be introduced in evidence.

We do not think that it is necessary to discuss any of the other points presented by counsel. In our opinion no material error was committed by the court below, and therefore the judgment of the court below will be affirmed.

RAILWAY COMPANIES — STATIONS. — Railway companies are bound to keep their stations and station-grounds in a safe condition: *Alabama etc. R. R. Co. v. Arnold*, 84 Ala. 150; 5 Am. St. Rep. 264, and note 263; *Wabash etc. R'y Co. v. Locke*, 112 Ind. 404; 2 Am. St. Rep. 193, and note 208; *Moses v. Louisville etc. R. R. Co.*, 30 La. Ann. 649, and note.

NEGLECTANCE, WHEN A FACT FOR THE JURY and when not: See *Bridger v. Ashville etc. R. R. Co.*, 29 S. C. 456; *post*, p. 653, and note; *Potter v. Flint etc. R. R. Co.*, 62 Mich. 22; *Stone v. Hunt*, 94 Mo. 475; *Guthrie v. Maine Central R. R. Co.*, 81 Me. 572; *Walt v. Burlington etc. R'y Co.*, 74 Iowa, 207.

KANSAS CITY ETC. RAILROAD COMPANY v. KIER.

[41 KANSAS, 681.]

RAILROAD COMPANIES. — RAILROAD COMPANY IS LIABLE TO ANY ONE OF ITS SERVANTS OPERATING ITS ROAD for the negligence of either one of its officers or servants whose duty it is to keep the road in a reasonably safe condition, and who culpably fails to perform such duty, or to give notice or warning thereof.

RAILROAD COMPANIES — LIABILITY FOR INJURIES TO EMPLOYEES RESULTING FROM UNSAFE CONDITION OF ROAD-BED. — The plaintiff was a brakeman in the employ of the defendant railroad company, and it was his duty to step from his train while it was moving slowly to open and adjust a certain switch. The ground about the switch had for a long time been level and hard, and was in that condition when the plaintiff's train passed that place in the morning; but before its return, after dark in the evening, the defendant company caused several car-loads of cinders to be dumped in heaps in and about the switch for ballast, leaving the ground soft and spongy. Without notice of the changed condition of the road-bed, the plaintiff stepped from his train in his usual and ordinary manner

for the purpose of turning the switch, when his feet struck the cinders in such a way as to cause him to lose his balance and be thrown under the train, whereby his left foot was so crushed and mangled that amputation was necessary. In such case, in the absence of contributory negligence on the part of the plaintiff, the defendant company would be liable in damages for the injuries he sustained.

RAILROAD COMPANIES — WHEN ESTABLISHED RULES OF RAILROAD COMPANY ARE TO BE DEEMED MODIFIED. — Rules established by a railroad company relative to the duties of conductors and others in opening and adjusting switches on its road, with notice thereof to conductors and other employees, must govern until abrogated or changed. But such rules are deemed changed or modified as to a brakeman, who, in obedience to the orders of the conductor of his train, and in the presence and with the knowledge of the division superintendent, who has charge of the management of the road, and directs the employees of the company in the performance of their duties, opens and adjusts the switch for a long time in a different manner from that prescribed by the established rules.

NEGLECTOR, CONTRIBUTORY — SUBMISSION OF QUESTION OF TO JURY. — Where, upon the testimony introduced in the case, the court submits to the jury the question of the plaintiff's contributory negligence, and the jury, by their verdict, find upon this question in favor of the plaintiff, the appellate court cannot, upon the evidence, which is greatly conflicting, as a matter of law, declare that the plaintiff was guilty of contributory negligence that would defeat his right of recovery.

NEGLECTOR — DAMAGES IN ACTION FOR PERSONAL INJURIES CAUSED BY — VERDICT NOT EXCESSIVE. — The plaintiff, at the time of the injuries complained of, was thirty-nine years of age, and for twelve years had been engaged in railroading, and intended it as his life business. As brakeman and car-cleaner he was earning eighty-five dollars per month, and was in good physical health. In such case, considering the injury he received, the amputation of his foot, the diseased condition of his leg at the time of the trial, and his inability to move around except upon crutches, a verdict for seven thousand dollars was not excessive.

ACTION by T. B. Kier against the Kansas City, Fort Scott, and Gulf Railroad Company to recover damages for personal injuries alleged to have been caused by the negligence of the defendant. The material facts appear in the opinion.

Wallace Pratt, Charles W. Blair, and Israel P. Dana, for the plaintiff in error.

J. D. McCue and M. O. Showalter, for the defendant in error.

HORTON, C. J. On the third day of December, 1885, and for about two and one half years prior thereto, Thomas B. Kier was a brakeman in the employ of the Kansas City, Fort Scott, and Gulf Railroad Company, on its regular passenger train running between Cherryvale, in Montgomery County, and Arcadia, in Crawford County; the train made daily trips each way, leaving Cherryvale at 7:25 in the morning and returning at 7:30 in the evening; in going to Arcadia it passed

Parsons at 8:21 in the morning, and on its return reached Parsons at 6:37 in the evening; the Parsons station was not on the main line, but was reached by passing over a switch or spur-track. The usual way of passing from the main line to the station was as follows: When the train was going east, the spur-track was connected with the main track, and the train was run backward over the spur to the station; when going west, the same connection was made, and the train was run forward to the station, and then run backward to the main line, when the switch was set in connection with the main line. It was the practice of Kier, and he alleged that it was his duty, when the train was backing out of Parsons, to take a position on the rear end of the train, and when the proper point was reached near the switch, to step to the side of the car and adjust the switch to connect the main line.

At the time of receiving the injury complained of, he had just stepped from the car for the purpose of turning the switch; he was thrown under the moving train of cars in such a position that the cars passed over his left foot, crushing and mangling the same to such an extent that it had to be amputated in order to save his life. This action was brought to recover damages of the company for the injury so received. The grounds upon which the plaintiff seeks to charge his injury to the negligence of the company are set forth in the petition as follows: "That on the morning of the third day of December, 1885, and for a long time prior thereto, the ground where the switch was located was solid and hard, and had been in such condition; that the service required of him in the moving and adjustment of the switch could be done in the manner stated without injury to his person; that he was well acquainted with the condition of the locality, and the condition of the track and ground around the switch; that on the morning of the third day of December, the passenger train on which he was employed as brakeman left the city of Cherryvale on its regular schedule time for its trip to Arcadia and return to Cherryvale; that it passed through the city of Parsons, and at that time the ground in and about the switch was in its usual good and safe condition, and he performed his required service in opening the switch in his usual manner as brakeman; that after the passenger train had left the city of Parsons, and before its return on the evening of said day, the company had caused to be deposited in and about the switch several car-loads of cinders, which were, by the

gross carelessness and negligence of the employees of the company, deposited and left in great heaps and piles upon either side of the track and in and about the switch, so that the ground upon either side of the track was raised to the height of fifteen inches, and so spongy and soft that a person stepping from the car would sink into them to a great depth, thereby rendering the ground in and about the track in an uneven, soft, spongy, and dangerous condition; that when the passenger train reached the city of Parsons on its return trip to the city of Cherryvale, on the third day of December, relying upon and believing the track to be in the same condition as when he passed over the same a few hours before, and without any information or knowledge of any change having been made, or that any cinders had been unloaded and deposited in and about the track and switch, or that the same, by reason of the gross carelessness and negligence of the company and its employees, had been left in the dangerous condition they were in, he stepped from the train for the purpose of turning the switch so that the train could and would pass onto the main track; that in stepping from the car, he did so in the usual and ordinary manner, exercising due care to prevent injury; that when he stepped from the car for said purpose, his feet sank into the cinders, which were soft and spongy, and gave way under his feet, causing him to lose his balance, and throwing him under the moving train of cars of the company."

Upon the trial, the evidence offered on the part of plaintiff tended to establish the foregoing allegations. It is contended by the railroad company that the petition does not state facts sufficient to constitute a cause of action, and therefore that no negligence of the company was proven at the trial. In support of this contention, it is said that the company owes to the public the duty of affording adequate instrumentalities for the transaction of its business and to make transportation safe; therefore, that it had the right to haul its ballast and put the same on the track just as it was done in this instance; that the company was not required to notify the plaintiff it was re-ballasting or repairing its road; that it was his duty to be on the constant lookout for ballast, or repairs on the track, either by eyesight or inquiry; that it was his duty to notice the condition of the track, which was open to observation, and if he failed to do so, it was such neglect, not only of his duty, but also of ordinary precaution for his safety, as to

bar recovery for any damages thereby. This court has already decided that "the law does not require that a railroad company shall, as between it and its employees, guarantee the sufficiency, good order, and good condition of its tracks and roadway, but merely requires that the railroad company shall exercise reasonable and ordinary care and diligence to keep its tracks and roadway in a reasonably safe condition": *St. Louis etc. R'y Co. v. Weaver*, 35 Kan. 412; 57 Am. Rep. 176; see also *Atchison etc. R. R. Co. v. Ledbetter*, 34 Kan. 331; *Atchison etc. R. R. Co. v. Wagner*, 33 Id. 660.

This court, however, decided in *Atchison etc. R. R. Co. v. Holt*, 29 Kan. 152 (107), that "the rule is, even under the common law, that a master employing servants upon any work, particularly a dangerous work, must use due and reasonable diligence that he does not induce them to work under the notion that they are working with proper and safe machinery, while employing defective and dangerous machinery; and if an employee is injured on that account, and without fault of his own, the master is liable in damages."

And in *Atchison etc. R. R. Co. v. Moore*, 29 Kan. 633, it is said: "In all cases, at common law, a master assumes the duty toward his servant of exercising reasonable care and diligence to provide the servant with a reasonably safe place at which to work. . . . And at common law, whenever the master delegates to an officer, servant, agent, or employee, high or low, the performance of any duty which really devolves upon the master himself, then such officer, servant, agent, or employee stands in the place of the master, and becomes a substitute for the master,—a vice-principal,—and the master is liable for his acts or his negligence."

In *Atchison etc. R. R. Co. v. Moore*, 31 Kan. 197, the law is declared that, "at common law, a railroad company is liable to a brakeman for injuries caused by the negligence of the road-master or foreman, whose duty it was, over a portion of the road, to direct repairs and keep it in a reasonably safe condition": See also *Hannibal etc. R. R. Co. v. Fox*, 31 Kan. 586.

Therefore, under the decisions of this court, if the road-bed or yard in and around the switch at Parsons had been changed by the dumping of cinders in heaps or piles after the train had passed through that place on the morning of December 3d, going east, and prior to its return in the evening, and the dumping of the cinders left the road-bed or yard in a dangerous condition, then, if it was the duty of Kier, as alleged in

his petition, to step from the car while it was moving slowly, for the purpose of turning the switch, and, without having any notice of the recent change in the condition of the road-bed or yard, he stepped from the car in his usual and ordinary manner, exercising proper care, and was thrown under the train on account of the dangerous condition of the road-bed or yard in and about the switch, the railroad company would be liable. With this view, the petition states facts sufficient to constitute a cause of action: *Hall v. Missouri Pac. R'y Co.*, 74 Mo. 298; *Hullehan v. Green Bay etc. R'y Co.*, 68 Wis. 520; *Kane v. Railway Co.*, 9 S. C. 16.

Counsel contend that if the plaintiff was entitled to be notified of the changed condition of the road-bed or yard, then every other employee would be equally entitled to like notice; and therefore that the company would be seriously embarrassed in the operation of its road. As we have already decided that a railroad company is liable to any one of its servants operating its road for the negligence of either one of its servants whose duty it is to keep the road in a reasonably safe condition, and who culpably fails to perform such duty or to give proper warning, we deem it unnecessary in this case to give further or additional reasons for the support of the law as declared by this court. It would seem to us, however, not very difficult or expensive, if a bridge, track, road-bed, or yard of a railroad company is in a dangerous condition, for the foreman having charge of the section or work to place thereon at night danger-signals, like red lights, so as to give warning to all the servants or employees of the company.

Hathaway v. Railroad Co., 29 Fed. Rep. 489, is cited as decisive against any recovery by the plaintiff. That case was tried in the United States circuit court for the southern district of Georgia, and the opinion was delivered by Speer, J. In many respects the facts in that case are similar to this. In that case the plaintiff was a flag-man, and the material deposited upon the track was sand instead of cinders. That case was taken from the jury, on the ground that the facts showed no negligence on the part of the railroad company. If the decision was based upon the theory that there was no evidence tending to show "that the sand was unnecessarily placed at the spot where the flag-man was injured, and unnecessarily kept there," the case might be distinguished from this; but if the decision in that case goes to the full extent claimed for it, that in attempting to repair, or in repairing its

track or road-bed, a company may place the same, while making its repairs, in a dangerous condition, and require its employees to perform duties at night on such a track or road-bed without any warning or notice of its changed and unsafe condition, we are not inclined to follow it.

The various decisions concerning ice and snow upon the track or road-bed are not contrary to the views expressed by us in this and former decisions, because employees might be required, under some circumstances, to take notice of ice and snow from the operation of natural causes upon the ground or work where they are employed. Such risks and hazards, according to some of the decisions, are incident to their employment.

It is further contended that Kier was out of his place at the switch,—was voluntarily performing a duty not his; therefore that he is barred from recovery by his contributory negligence. The rules of the company introduced in evidence are as follows:—

“14. Every conductor must personally open and close switches used by his train or engine, and will be held responsible for the proper adjustment of the switches. When there is more than one train to use a switch, conductors must not leave the switch open for the following train, even when in sight, unless the conductor of the following train is at the switch and takes charge of it.”

“19. Station agents are held responsible for the safety of switches, which must always (except when a man is standing by) be kept locked and right for trains running on the main track. (This is not intended to relieve conductors and others from care of switches they may use; whoever throws a switch upon a side-track must see it back on the main line.)”

The conductor of the train testified that he regarded the opening of the switch as the duty of Kier. Kier also testified that it was his duty to turn the switch; that he performed this duty during his entire service as brakeman on the passenger train; that he did this under the direction of the conductor; and that he had often performed this duty in the same way in the presence of the division superintendent. The conductor testified that he was under the immediate direction and supervision of the division superintendent; that this superintendent directed the employees on the train in the performance of their duty; that the division superintendent was his superior, and that he obeyed his orders in the operation of

the road; therefore, notice to the division superintendent was notice to the company; and when Kier, under the direction of the conductor, opened and adjusted the switch during all the time he was brakeman, in the manner he did, without any complaint or objection on the part of the division superintendent, who saw him perform his work, we do not think it can be said, as a matter of law, that Kier was out of his place at the time of receiving his injury.

We think, upon the testimony, that the court did not err in instructing the jury as follows: "I may say to you, relative to these rules and regulations, they may be modified at the will of the defendant in this action by those having authority to do so, verbally or otherwise, and in charge and control of its business; and if you find, or have the right to infer, from the evidence which has been offered on the trial of this cause, any of its rules have been so modified by this defendant, by those having authority to do so, then such modification, whether in one form or the other, is to be accepted by you; but if there has been no modification, you would not be justified in so finding."

It is also contended that the evidence shows that Kier fell over the switch-block by his own carelessness, and that the cinders dumped upon the road-bed or yard had nothing whatever to do with his injury. The evidence in the case is greatly conflicting, but as the jury credited Kier and his witnesses, and as the trial court approved the verdict, we cannot disregard this evidence, and say that Kier brought his misfortunes on himself by his own recklessness. Whether the defendant was guilty of negligence causing and contributing to his injury was one of the leading issues in the case.

Upon the evidence and instructions the jury found in favor of Kier; and although there was ample evidence to justify a different verdict, the facts have been determined by the jury adversely to the company; and as there was sufficient testimony before the jury to support the allegations of the petition and the verdict, we cannot interfere.

The evidence of E. O. Brown as to the safety of a person stepping from a moving train going six or seven miles an hour, even if erroneously received, is not sufficient for a reversal. He was only permitted to give his opinion in answer to one question. The testimony of Kier that he had daily stepped off the moving train to set and adjust the switch while in the service

of the company as brakeman was more conclusive than any mere opinion.

Finally, it is contended that the trial court committed error in instructing the jury upon the law of exemplary or punitive damages. The verdict was for seven thousand dollars; Kier at the time of his injury was thirty-nine years of age; for twelve years he had been engaged in railroading, and intended it as his business in life; as brakeman and car-cleaner he was earning eighty-five dollars per month, and was in good physical health; therefore, considering the injury that he received, the amputation of his foot, the diseased condition of his leg at the time of the trial, and his inability to move around except upon crutches, the verdict was not excessive. The instruction complained of is subject to criticism. Courts, in such cases as this, should not instruct concerning gross negligence, unless the same amounts to wantonness: *Southern Kansas R'y Co. v. Rice*, 38 Kan. 398; 5 Am. St. Rep. 766; *Atchison etc. R. R. Co. v. Gants*, 38 Kan. 608; 5 Am. St. Rep. 780; *Kansas Pacific R'y Co. v. Whipple*, 39 Kan. 581; and should not instruct upon gross negligence, even if amounting to wantonness, unless there is sufficient evidence before the jury to render it necessary: *Kansas Pacific R'y Co. v. Peavey*, 29 Id. 169; 44 Am. Rep. 630.

In this case the evidence as to gross negligence, if any, is very slight; but in view of the damages awarded, we do not think the instruction sufficiently material to reverse the judgment.

In the case of *Kansas Pacific R'y Co. v. Peavey*, *supra*, we held a similar instruction misleading, where it was apparent from the evidence that the engineer was not guilty of such gross negligence as implied willful injury. In that case the damages awarded were excessive, six thousand five hundred dollars being allowed for the loss of a thumb and first finger. The reversal was not solely upon the ground of the misleading instruction on gross negligence, but for other manifest errors, and also for excessive damages.

Other points are presented in the briefs, which we have fully considered, but did not think it necessary to consume time to discuss.

Upon the whole record, we cannot say that any error was committed by the trial court so prejudicial to the railroad company as to justify a new trial.

RAILWAY COMPANIES. — A section-foreman, whose duty is to keep the track in a safe condition, is not a co-servant with the conductor and those whose duty it is to run trains over the track: *St. Louis etc. R'y Co. v. Weaver*, 35 Kan. 412; 57 Am. Rep. 176, and extended note 182-187; note to *Fisk v. Central P. E. R. Co.*, 1 Am. St. Rep. 32, 33.

MASTER AND SERVANT. — As to the duty of a master to furnish safe machinery and appliances for his servant, see *Richmond etc. R'y Co. v. Norment*, 84 Va. 167; 10 Am. St. Rep. 827, and note 835.

CONTRIBUTORY NEGLIGENCE IS ORDINARILY A QUESTION for the jury to determine: *Emery v. Raleigh etc. R. R. Co.*, 102 N. C. 209; 11 Am. St. Rep. 727, and note; *Durbie v. Oregon etc. R. R. & Nav. Co.*, 17 Or. 5; 11 Am. St. Rep. 778, and cases collected in note 785.

DAMAGES. — **EXCESSIVE VERDICTS:** See *Virginia etc. R'y Co. v. White*, 84 Va. 496; 10 Am. St. Rep. 874, and note 882.

SOUTHERN KANSAS RAILWAY COMPANY v. CROKER.

[41 KANSAS, 747.]

MASTER AND SERVANT — DUTY OF MASTER TO FURNISH SAFE TOOLS. — It is the servant's own fault if he undertakes to perform without sufficient skill, or applies less than the occasion requires. But a section-hand who complains of the bad condition of the tool with which he has to work, and is promised a better one, and is told to work with the defective tool until the others arrive, and, relying on such promise, he does so, and is injured by the use of the defective tool, he may recover for the damages resulting. His solicitation of employment in a certain line of work is not an assertion on his part that he can work with defective tools.

George R. Peck, A. A. Hurd, and J. G. Egan, for the plaintiff in error.

Knight and Foust, for the defendant in error.

SIMPSON, C. Suit to recover damages for personal injuries received by the defendant in error in the line of his employment as a section-hand of the Southern Kansas Railroad Company, commenced on the twelfth day of July, 1886; tried at the March term, 1887, of the district court of Allen County, resulting in a judgment in favor of the defendant in error for \$2,654.88.

The defendant in error, Walter Croker, was employed as a section-hand by the railroad company in August, 1885. He is a young man about twenty-two years of age, and before his employment by the plaintiff in error had never worked on any public works. From the time of his employment until the thirtieth day of March, 1886, he had been engaged in the ordinary duties of a section-hand, doing all that he was ordered

to do to keep the track in good repair. On the thirtieth day of March, 1886, in the afternoon, he was engaged in breaking rock for balast, using for that purpose a stone-hammer that weighed three and one half pounds. The handle of the hammer was a green stick, cut from the brush adjoining the track, and was crooked. The defendant in error had complained directly to the section-foreman about the handle being defective, he having been slightly injured before by the use of such a handle. The foreman told him to work with this one as it was, and that he would get good handles in a few days. He struck a blow on a limestone rock with the hammer, and a small particle of the stone struck him in the eye, and destroyed its sight. In two days after the injury, the eye was taken out by oculists in Kansas City. The jury, in answer to special interrogatories, found as follows:—

"1. Was the plaintiff, at the time of his employment by the defendant, a man of ordinary intelligence and information? A. Yes.

"2. How long had the plaintiff been in the employment of the defendant at the time of the injury complained of? A. About seven or eight months.

"3. Did the plaintiff understand what he was expected to do under his employment at the time he entered the service of the defendant? A. Yes.

"4. How long had the plaintiff been engaged in the use of the stone-hammer in question, before the day on which he was injured? A. About three or four days.

"5. Was the plaintiff familiar with the use of the stone-hammer in question, at the time of the injury received by him? A. Yes.

"6. Did the plaintiff know of all the defects, if any existed, in the handle of the hammer he was using, at the time he worked with it, and at the time of the injury he received? A. Yes.

"7. Could the plaintiff have put a new handle in the hammer-head if he had chosen so to do? A. No.

"8. Was the plaintiff at work for the defendant by the day or by the month, at the time of his injury? A. By the day.

"9. Was the work of breaking rock while in the employ of the defendant such work as the plaintiff was competent to do? A. Yes.

"10. Which one of the three handles introduced in evidence is the one that plaintiff was using at the time a piece of the

rock flew off and hit him, prior to the day on which he was hurt, as alleged in this case? A. Either exhibits 2 or 3.

"11. Were the three hammer-handles introduced in evidence made by the workmen who were repairing the track and breaking rock with the plaintiff? [Objected.] A. Don't know.

"12. Did the foreman, Neely Frame, give the men who made the three hammer-handles in evidence any directions as to the character of the handles that they should make? A. Don't know.

"13. Did the foreman, Neely Frame, give the men who made the handles any instructions whatever as to the length, thickness, straightness, or elasticity of the handles they were to procure? A. Don't know.

"14. How much, if anything, did you allow to the plaintiff for the services of the doctors in Kansas City? A. Fifty dollars.

"15. How much, if anything, did you allow to the plaintiff for the loss of time during period of time following the injury? A. One hundred dollars."

The motion for a new trial was overruled, and the exceptions saved present the questions discussed by counsel for plaintiff in error. There are only two. The first is, that at the trial the defendant in error was allowed to testify that before he entered the employment of the railroad company, in August, 1885, he had not labored on public works of any kind. It is said that this was a mere subterfuge to excuse the plaintiff's own carelessness and negligence; that the court having allowed this to go to the jury, they had license thus given them to conclude that the plaintiff was not bound to exercise ordinary care and sense in doing the work. While we doubt very much whether any importance was attached to this evidence by either the court or jury, we will discuss it as if it was an important and controlling fact in the case. Giving the plaintiff in error the benefit of the ruling in the case of *Union Pac. R'y Co. v. Estes*, 37 Kan. 715, to the fullest extent, and holding that his employment as a section-hand was an assertion on his part that he could break stone for ballast, and the result is that the company would not be liable for any accidental injury that happened in the line of that employment. This is upon the theory that the company furnished him with the usual tools that were used to do such work, and that these tools were in good condition. But his employment was not

an assertion on his part that he could break rock for ballast with stone-hammers with crooked handles. The record shows that he had complained of the hammers, and the foreman had promised to procure new and better handles. The duty of the company is plainly understood to be to furnish reasonably safe tools for doing this kind of work; these hammers were defective; a protest was made against their use; a promise given that good new handles would be forthcoming; and this promise was accompanied by an order "to go ahead and work with them"; the work proceeded, and the injury was the result of the use of the defective handle of the hammer. The conclusion is irresistible that the railroad company did not exercise that degree of care required by law in furnishing proper tools with which to do the work required of the section-men, and was guilty of negligence in requiring the use of defective hammers.

The other objection is confined to the answers to the seventh and tenth special questions submitted to the jury. We do not deem these very important or influential in determining the result. If the answers to these questions had been yes, they would not have changed the result, neither would these answers have been inconsistent with the general verdict of the jury. Was it the duty of the defendant in error, under the terms of his employment, to put a new handle in the hammer-head? If it was, the foreman ought to have ordered him to do so when he complained of the defect; but instead of that, he was told to go ahead and work with it until the new one arrived. Again, what difference does it make who made the handles that were used? — the natural inquiry being, whether or not they were reasonably adapted to their use, and were safe. We have read this record carefully, and with the exception of the evidence of the witness Lorange, there is no testimony to show that two of the handles were made by the workmen. Lorange says he made one of them, but as to the other two, it is not disclosed who made them. The answer in this respect is truthful. However, no matter how the question is answered, we regard it as an immaterial matter, for if it was the duty of the workmen to make them, they must make good and safe ones.

This case was fairly tried; the railroad company produced no evidence; there are no exceptions to the instructions of the court; these two immaterial matters are the only complaints made; the verdict, and the means by which it was arrived at,

are approved by a trial judge who is unusually careful and considerate; and justice requires that such a verdict should not be lightly disposed of. Having no doubt but that substantial justice has been done, we recommend that the judgment be affirmed.

By the COURT. It is so ordered.

MASTER AND SERVANT. — As to the duty of the master to furnish safe machinery and appliances for his servants, see *Richmond etc. Ry Co. v. Norman*, 84 Va. 167; 10 Am. St. Rep. 827, and note 825.

EFFECT OF SERVANT CONTINUING IN THE MASTER'S EMPLOY after knowledge of defects in machinery and appliances: Note to *Richmond etc. Ry Co. v. Norman*, 10 Am. St. Rep. 825.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

WITHERAL v. MUSKEGON BOOMING COMPANY.

[68 MICHIGAN, 48.]

WATERCOURSES — RIPARIAN RIGHTS — DAMAGES FROM JAM OF LOGS. —

In an action for damages, evidence that a booming company had possession of a river, and was running logs thereon, which logs jammed below plaintiff's place, and that the company kept running logs against such jam, and filled up the river until the jam extended through plaintiff's farm, and above it, where it remained for a month, establishes a *prima facie* case of negligence against such company if unexplained, and makes it unnecessary for plaintiff to go further, and show lack of use of reasonable care and dispatch by the company in order to recover damages.

WATERCOURSES — RIPARIAN RIGHTS. — A jam of logs in a river does not, of itself, constitute negligence upon the part of a booming company running logs in such river; but the existence of such jam for a month or more, and the continued running of logs in such manner as to increase the jam during such period, does, unexplained, constitute negligence.

TITLE SUFFICIENT TO MAINTAIN ACTION FOR DAMAGES. — Plaintiff in possession under a paid-up contract entitling him to a deed has title sufficient to enable him to recover for the loss of hay and pasturage through the negligence of a log-booming company.

TITLE SUFFICIENT TO MAINTAIN ACTION FOR DAMAGES. — Where a contract for the purchase of land provides that the vendor is to have one half of the proceeds of the hay cut upon the premises until the purchase-money is paid, the title, property, and possession remain in the vendee, so as to maintain an action for the loss of such hay, as he only has to account to the vendor in money for one half the hay gathered, sold, or otherwise disposed of.

DAMAGES — EVIDENCE. — In an action to recover damages for the negligent flooding of plaintiff's land, and destruction of his hay thereby, evidence of the amount of hay gathered from the land the year previous to the injury complained of is admissible to show the capacity of the land for producing hay.

DAMAGES — NEGLIGENCE — EVIDENCE. — Destruction of pasturage by negligently flooding plaintiff's land is *prima facie* evidence at least of damages to the amount of its value.

WATERCOURSES — RIPARIAN RIGHT — RIGHTS OF LOG-BOOMERS. — A log-owner has a right to use the stream in its natural capacity to float his logs, and is not responsible for any damage, incidentally and without his fault, arising therefrom. But he has no right to so deal with his logs, by the forming of jams or otherwise, as to cause the water to overflow the adjoining lands more than it would were the logs left to themselves and allowed to float down naturally, and without artificial interference.

WATERCOURSES — RIPARIAN RIGHTS — RIGHT OF LOG-BOOMERS. — Where a navigable river has a well-defined channel or bed between well-defined banks, the low or bottom lands upon the side of the stream that are overflowed in times of high water are not within the boundaries of such stream, and the capacity of such stream cannot be increased by artificial means so as to permit a log-owner to use at all times the full volume of water that may flow in the stream during unusual and brief freshets.

WATERCOURSES. — **RIGHT OF NAVIGATION** is measured by the capacity of the stream for valuable purposes in its natural condition, and any attempt to create capacity at other times at the expense of private interests can be justified only on an assessment and payment of compensation.

DAMAGES — NEGLIGENCE — RIGHT TO RUN LOGS DOWN STREAM. — In an action for damages caused by the overflow of plaintiff's land from a jam of logs in a navigable stream, the defendant is not liable for any damage caused before he assumed control of the logs, or had the right to do so, and not then, if he ran the logs in a careful, diligent, and prudent manner. If he uses necessary care to prevent the formation of jams, and to break those already formed within a reasonable time after he took charge of them, or had the right to do so, and does not unnecessarily run logs against jams already formed, there can be no recovery.

Keating and Dickerman, and Edwin F. Uhl, for the appellant.

Gallup and Pearson, and Smith, Nims, Hoyt, and Erwin, for the plaintiff.

MORSE, J. In November, 1886, the plaintiff, who resides in Missaukee County, commenced this suit against the defendant, in the circuit court for the county of Muskegon, for damages to his premises and property, situated upon the banks of the Muskegon River, in Missaukee County, occasioned, as he claims, by the defendant's wrongful action while in the control and possession of said river, and in the transaction of its business as a booming company.

The claim, as developed upon the trial, was for damages to his hay crop in the years 1881, 1882, 1883, 1885, and 1886, and the loss of pasturage for his cattle during some or all of the years from 1881 to 1886, inclusive.

The declaration averred that this injury and loss were occa-

sioned by reason of said defendant carelessly, improperly, and negligently allowing a jam or jams of logs, timber, and other floatables to accumulate in said stream, below the close and premises of said plaintiff, and so permitting the same to remain for a long space of time; by reason of which jams the river overflowed its banks and flooded the plaintiff's lands, destroying his crops of hay, and washing away the approaches to a bridge he had built across the river, so that he was unable to use his pasture land.

The plaintiff purchased his land in April 1876, taking a land contract for the same of the firm of Gerrish, Murphy, & Co., who were then the owners of it. The farm contains 240 acres, and lies on both sides of the river. When plaintiff went into possession of it there were sixty acres cleared on the right, or west, bank. His house was on the left, or east, bank. What he has cleared since has been mostly high land. His meadows, or bottom lands, were on the west bank, opposite of his house. He had access to these lands by a bridge maintained by him across the river. He recovered a judgment upon the verdict of a jury in the sum of five hundred dollars. The defendant brings error.

After the plaintiff had rested his case, the defendant moved to strike out all the evidence in the case, and that the court direct a verdict for the defendant, for the reason that the plaintiff had not thus far established any negligence upon the part of the defendant, or shown how or in what manner the defendant had been guilty of negligence, which motion was overruled.

We think there was evidence at the close of plaintiff's case sufficient to warrant its submission to the jury. The plaintiff testified that in the middle of April, 1881, the booming company had possession of the river, and its men were running logs thereon; that the logs jammed below his place, and the company, by its employees, kept running logs down against this jam, and filled up the river until the jam extended through his farm and above it, and that the jam laid there from the middle of May until the tenth of June. This was certainly sufficient to call for explanation and excuse, if any could be shown, upon the part of the defendant. Without explanation, it was *prima facie* evidence of negligence.

A mere jam of logs in the river does not, in itself and by itself, constitute negligence upon the part of the booming

company running the river; but the existence of such jam for a month or more, and the continued running of logs in such a manner as to increase the jam during such period, does constitute negligence, unless there is a showing that such a state of things could not reasonably be avoided.

It was not necessary for the plaintiff to go further than he did, and show that the company did not use reasonable care and dispatch in its work, or to specify in what respect its employees were careless or negligent.

We do not perceive that the court erred in admitting the plaintiff's proof of title. He had paid up the contract, and was entitled to a deed. He went into possession under it at once, and has ever since remained in possession, and his title under the contract and his possession were sufficient to entitle him to recover for the hay and loss of pasturage: *Field v. Apple River Log Driving Co.*, 67 Wis. 569; *Hungerford v. Redford*, 29 Id. 345; *McNarra v. Chicago etc. R'y Co.*, 41 Id. 69; *Carl v. Sheboygan etc. R. R. Co.*, 46 Id. 632.

The contract contained the following clause: "The said parties of the first part [Gerrish, Murphy, & Co.] are to have one half of the proceeds of the hay raised on said premises until the whole amount is paid."

The defendant's counsel claim that one half of the hay belonged, under this provision, to Gerrish, Murphy, & Co. We do not consider that this clause of the contract gave Gerrish, Murphy, & Co. any title to the hay. The plain intent of the language is, that plaintiff should account to them in money for the value of one half of the hay, but the hay was to be gathered, sold, or otherwise disposed of, as the plaintiff saw fit; the title, property, and possession always remaining and being in him.

The plaintiff was allowed to state, against the objection of defendant's counsel, the amount of hay he cut upon this land in 1880, the year before he claimed any damage to his crop by the company. This evidence was admissible to show the capacity of the land for producing hay: *Booming Co. v. Jarvis*, 30 Mich. 327.

It is argued that the plaintiff was not entitled to compensation for the loss of pasturage occasioned by the flood or overflow washing away the approaches to his bridge so that he could not get his cattle across the river and upon his pasture lands, because it is not shown that his cattle were not as well fed in the road or somewhere else, or that they were not

in as good condition, or that he was put to any expense in herding or feeding them, growing out of the inability to reach his meadow ground.

This argument requires no extended answer. The plaintiff was entitled to the benefit and worth of this pasturage. If it was destroyed by the negligence of the defendant, its destruction was, of itself, *prima facie* evidence, to say the least, of damage to the amount of its value.

The circuit judge instructed the jury as follows:—

“The right of the plaintiff to farm his land and of the defendant to navigate the stream were concurrent rights, and the defendant was not responsible for any injury to the plaintiff arising from the location of his farm where the stream was subject to the proper use by the defendant of its water for purposes of navigation. And the first duty of the jury in this case is to distinguish between the responsibility and duties of the defendant in the management of the river, and the duties of the others, or the responsibility of others.

“It is admitted, for instance, or at least the evidence is all one way on the question, that the defendant did not itself put the logs in question in this stream in any of those years, and therefore it follows that any injury which was caused to the plaintiff by reason of the fact that such logs were in the stream, and created jams, would not be recoverable in this action against the defendant, nor would the defendant be liable to the plaintiff for any injury caused by running logs down the stream by the defendant, if it did so in a careful, prudent, and diligent manner, having due regard to the rights of the plaintiff and the injury liable to be suffered by him and other riparian owners by the backing up of water caused by jams, etc.

“The plaintiff, to make a case, then, must show that the defendant was guilty of the neglect of duty, and of the failure to use due diligence and care to prevent unnecessary flooding while operating upon the river. What, then, was the duty of the defendant in the premises, the failure to observe which would render it liable? The duty of the company was to employ a sufficient force of men to break jams as soon as possible when formed by causes not attributable to it, as, for instance, by a roll-way put into the stream by others,—as soon as possible after the company had assumed control of such roll-way is meant, or had the right to assume control of it,—and to use a sufficient force of men, and to employ due

- 、 diligence to prevent the formation of jams; and if jams were formed by the company while running logs, which could have been prevented by the exercise of due diligence and caution, and injury resulted to the plaintiff by the backwater caused by such jams, the defendant would be liable.

“So if a jam already formed by others, as by a roll-way so found in the stream, and the defendant negligently and not of necessity drove logs upon and against such jam, and thereby increased such jam, and the consequent backing of water, when by the exercise of due care it might have broken such jam before running such logs down to and against it, or if the jury are of the opinion that due care and caution and prudence would have dictated and required the holding back of such logs until such jam was broken, and should find as a fact that the defendant drove such logs down unnecessarily, then the defendant would be liable for such damage as would be caused thereby; and, of course, as the defendant was not responsible for the logs being in the stream, it follows that no liability would arise on this ground unless the defendant was actually running the logs down to and against the jam. If the current of the stream, unassisted, would take the logs down, and the defendant did nothing towards assisting of the running of the logs, no liability would arise.

“You will understand that the converse of these propositions I have stated is true, viz.: If the company employed a sufficient force of men to break the jams within a reasonable time after the same formed, or after they took charge of the same when formed by others, or had the right to take charge of the same, and if the servants of the company used due diligence and care to prevent the formation of jams, and did not contribute by negligently running logs against the jams, or form or increase the backwater on plaintiff's land, there can be no recovery.

“As to when it became the duty of the defendant to take charge of jams formed by others, I instruct you that whenever it becomes necessary to enable the defendant to run its logs without damage to the riparian proprietors,—and by this I mean without damage other than such as would arise from the unobstructed navigation of the stream by the logs,—whenever, I say, it became necessary for the defendant, in order to navigate the stream in this manner, to break jams caused by others, it had the right to take possession of the logs forming such jams and to break the jams. It not only

had the right to do so, but before it would be privileged to run logs up and against such jams, thereby increasing the said backing of water upon the plaintiff's land, it would become its duty to do so.

"Unless such necessity arises from the obstruction of its own business in running the logs upon the river, the defendant had no right to assume control or management of logs of third parties which were also floating in the river, unless the parties owning these logs consented to the booming company doing so, and even where this necessity arises from the obstruction to the booming company, it cannot assume control and management of the logs of third parties who have not consented to the same being done unless those parties are guilty of negligence in managing their logs floating on the river, or have not made adequate provision for the same; that is to say, unless it becomes necessary, unless they find jams or other obstructions to the proper navigation of the stream, then the company would have no right to take possession of the logs, and certainly would not be accountable to the plaintiff or to other riparian owners for any injury they suffered by logs owned by other parties being in the stream.

"Some evidence has been offered which it is claimed tends to show that on certain occasions the water was let down in large quantities from above by parties operating on the Butterfield, and Houghton Lake, causing an increased flooding of plaintiff's land. The defendant cannot be held responsible for this, and is, of course, not liable for any injury which resulted to the plaintiff by reason thereof. Nor is the company liable for any injury caused by ordinary freshets, nor by floods created or caused by roll-ways of third parties situated below the premises of the plaintiff, which created jams, and which caused the water to back upon and flood the premises of the plaintiff.

"To sum up briefly, then, what will justify a recovery, the plaintiff must show, or you must find, from the whole evidence, either,—1. That the defendant caused the jams in the river which occasioned the overflowing of plaintiff's land, doing him damage; or 2. That jams of logs under its charge occurred, which the exercise of due care on its part might have prevented; or 3. That the plaintiff suffered because the defendant did not exercise due diligence in breaking such jams as may have been formed; or 4. That the defendant caused a flood, or an increase of flooding, by running logs against such

jams caused by others, in a negligent and unreasonable manner.

"To entitle the plaintiff to recover, it must also appear that the flooding of which the plaintiff complains exceeded that which resulted from logs running down the river in a natural state. By this I do not mean to say that, because the logs might have jammed if left uncontrolled, the defendant would not be liable if a jam was negligently permitted to form, and from which the plaintiff suffered while the logs were under the control of the defendant, and being run by the company.

"I think a positive duty devolved upon the defendant, and it cannot be assumed that the owners of the logs would have left them uncontrolled if the defendant had not taken charge of them, and certainly the right of navigation involves no right upon the part of the owners, of those controlling logs, to cast them into the stream and leave them thus uncontrolled.

"The question is, whether the plaintiff suffered because of jams which were made by those logs while under the control of the defendant, which logs caused a larger overflow of water than the proper navigation of the stream by such logs would have caused, and caused the forming of, or increasing to damaging proportions of, such jams, having been formed by the defendant, taking the stream as it found it, with the logs as it found them in the stream, and running the logs in a diligent, careful, and prudent manner. If these questions are determined in the affirmative, the plaintiff is entitled to recover; otherwise, not."

The jury were also instructed that the burden of proof was upon the plaintiff to establish his case, on each fact requisite to make his case, by a fair preponderance of the evidence in the whole case.

Most of the requests asked by defendant's counsel were fairly and substantially covered by this charge; and as a whole, no reasonable fault can be found with it.

The court was requested to instruct the jury that the natural channel of the Muskegon River is within the boundaries that the water reaches at high stage; that if the jury found that the lands of the plaintiff were overflowed by floods on the river in the absence of logs, or with logs floating in their natural condition, and not controlled by man, at the high stages of the river, which it might reach at one or more times during every year, then the plaintiff could not complain if the floods upon

his premises were at no greater height than when the river was at high stage, as the boundaries of the river extend to where they would be when this river was at its high stage, and not when the river was at its low stage; that the boundaries of the Muskegon are not the boundaries marked by low-water mark on the river, but those defined and marked by the highest mark of water flowing through the premises of plaintiff at any time during the year; and that the defendant had the right to use the river to the width of these natural boundaries, when the river stands at its highest water-mark, in the transportation of logs. The refusal of the circuit judge to so instruct the jury is assigned as error.

The doctrine contended for in the language of this request is broad enough to permit the defendant at any time of the year to dam up the river, by jams or otherwise, and flood the plaintiff's land to the full extent of the most extraordinary freshet of the year; and it is gravely argued by defendant's counsel that because the testimony shows that in April, when the snow would go off suddenly, nearly the whole of the fifteen acres of the plaintiff's bottom land or meadow would be overflowed for three or four days, therefore the defendant was entitled to so flood it in the running of its logs at any time and all times of the year. There is neither sense nor law in this claim. Such doctrine, applied to the navigable streams of this or any other state, would practically destroy the rights of riparian owners to the use and benefit of the best and most valuable lands in the country, and instead of giving concurrent rights to the land proprietor and the navigator, would make the landed estate servient and subordinate to the rights of navigation.

The chief argument in favor of this proposition we listened to, but cannot tolerate. It was contended that the lumbering interests of this state were so extensive, important, and valuable, and the work of running logs in these streams so necessary to the welfare and prosperity of the business interests of our state, that the policy of the law must impose this servitude and damage upon the small farmer, or this vast source of wealth and profit and livelihood to so many of our citizens be crippled or entirely destroyed. But the theory of the law cannot be this. The law had its origin in the desire to protect the weak against the strong, and thereby to preserve order and the public peace; and as the years have advanced and enlightened the law, they have settled, we think, at least in a —

republican form of government, the right and privilege of the poorest and the weakest man to hold and retain his little own, under the law, equally with the highest and strongest of his fellows. It is better in the present case that there should be, if need be, a little less wealth and profit grow out of the lumbering business, rather than that, in effect, the title deed of one man to his home, or any part of it, should be swept or flooded away from him without recompense.

The law as to the rights of the log-runner has been well stated by this court on several occasions. The log-owner has the right to use the stream in its natural capacity to float his lumber or timber, and is not responsible for any damage incidentally and without his fault arising therefrom. But he has no right to deal with his logs in such a way, by the formation of jams or otherwise, as to cause the water to overflow the adjoining lands more than it would were the logs left to themselves, and allowed to float down naturally and without artificial interference: *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308; *White River Log Co. v. Nelson*, 45 Id. 578; *Anderson v. Thunder etc. Boom Co.*, 61 Id. 489; *Thunder etc. Booming Co. v. Speechly*, 31 Id. 344; 18 Am. Rep. 184; *Bauman v. Perre M. Boom Co.*, 66 Mich. 544.

The Muskegon River has a well-defined channel or bed between well-defined banks or sides. The low or bottom lands upon the sides of the stream that are overflowed more or less in times of high water are not within the boundaries of said stream; and it has been heretofore settled, in *Thunder etc. Booming Co. v. Speechly*, *supra*, that the capacity of these navigable streams cannot be increased by artificial means, so as to permit the log-owner to use at all times the full volume of water that may flow in the stream during unusual and brief freshets.

The public right of navigation is "measured by the capacity of the stream for valuable public use in its natural condition, and any attempt to create capacity at other times, at the expense of private interest, can be justified only on an assessment and payment of compensation": See also *Morgan v. King*, 35 N. Y. 460; 91 Am. Dec. 58; *Hubbard v. Bell*, 54 Ill. 110; 5 Am. Rep. 98.

Much of the argument of the defendant's counsel here has been devoted to the claim that the evidence, taken together, upon both sides, established the fact that the defendant used all the diligence and care within its power, under the circumstances, to remove these jams and to run the logs without

injury to the plaintiff; that the company was not negligent, but that the damage was caused by the joint action of log-owners below and above the land of plaintiff, consisting of the maintaining of jams and roll-ways by those below, and the running down by those above of large quantities of logs from the creeks and other tributaries of the Muskegon against these jams below.

We think there was evidence sufficient to go to the jury upon the question of the defendant's negligence and liability, and with the weight of the testimony we can have no concern.

A careful examination of the charge of the court, as stated in this opinion, will, we think, disclose that the circuit judge clearly advised the jury that the defendant was not liable for the acts of these third parties. The defendant, under the instructions of the court below, was not to be held liable for any damage occasioned before it assumed control of the logs, or had the right to do so, and not then if it ran the logs in a careful, diligent, and prudent manner. If the defendant was not running logs down the stream against these jams, and did nothing in assisting them down, no liability would arise. And if the company used a sufficient number of men to prevent the unnecessary formation of jams, and to break the jams already formed, within a reasonable time after it took charge of them, or had the right to take such charge, and did not run logs unnecessarily against these jams, there could be no recovery.

It seems to me, from the evidence in the record, and the charge of the court, that the question of the defendant's liability was fairly submitted to the jury, and that no prejudice resulted to it because of a want of care on the part of the circuit judge in pointing out the distinction between the liability of the defendant company for its own negligent acts, and its liability for the acts of other parties who were running logs upon the river. I do not think the jury were misled into assessing damages to the defendant which belonged to others to pay.

There was evidence introduced in rebuttal by plaintiff tending to show that the jams formed by others below, and the running of logs by others above, plaintiff's farm, did not cause the injury to plaintiff. As such evidence is not given in full, we cannot judge of its weight or truth, if we had the right to do so.

The judgment will be affirmed, with costs.

WATERCOURSES — LOGS AND LOGGING. — Persons putting logs into a navigable stream are liable to riparian proprietors for injury to lands occasioned by jams, which raise the water to such a height as to cause an overflow. And if a boom-company, knowing of the existence of a jam and of their inability to remove the same, add more logs to such jam, they are liable in damages for injuries occasioned thereby: *Bauman v. Pere Marquette*, 66 Mich. 544.

WATERCOURSES — RIGHTS OF FLOATAGE. — The public has an easement to float logs in all streams which are suitable for the purpose, whether navigable or non-navigable: *Gerish v. Brown*, 51 Me. 256; 81 Am. Dec. 569; *Brown v. Chadbourne*, 31 Me. 9; 50 Am. Dec. 641; *Lancy v. Clifford*, 54 Me. 487; 92 Am. Dec. 561; *Moore v. Sanborn*, 2 Mich. 519; 59 Am. Dec. 209; *Treat v. Lord*, 42 Me. 552; 66 Am. Dec. 298; note to *Davis v. Winslow*, 81 Id. 582 et seq.; but such easement must be exercised in a reasonable manner: *Lancy v. Clifford*, 54 Me. 487; 92 Am. Dec. 561; and the right to raft and float logs does not carry with it the right to boom them upon private property for safe-keeping or storage: *Lorman v. Benson*, 8 Mich. 18; 77 Am. Dec. 435; and one floating logs in a public stream is responsible for any improper use of the stream, or any unnecessary injury to the adjacent land: *Carter v. Thurston*, 58 N. H. 104; 42 Am. Rep. 584; but a boom company authorized by the legislature to build a boom in a navigable river is not liable for an injury by an extraordinary flood which it could not anticipate, provided its boom was properly constructed: *Borchardt v. Wausau Boom Co.*, 54 Wis. 107; 41 Am. Rep. 12; compare *Bauman v. Pere Marquette Boom Co.*, 66 Mich. 544.

RIGHTS AND LIABILITIES OF OWNERS OF DAMS which work injury by causing overflows: Extended note to *McCoy v. Danley*, 57 Am. Dec. 684-693.

TYLER v. ESTATE OF GALLOP.

[68 MICHIGAN, 185.]

ESTATES OF DECEASED PERSONS. — Judgment entry on an appeal from the commissioners of claims against an estate should be an allowance or disallowance of the claim, which should be certified to the probate court.

INFANCY — BURDEN OF PROOF TO SHOW RATIFICATION OF CONTRACT. — In an action on a note executed by a minor, the burden of proof is on plaintiff to show that the minor ratified the note after he attained his majority.

INFANCY — RATIFICATION OF CONTRACT — PRESUMPTION. — The mere silence of the maker of a note for two years after attaining majority does not raise the presumption of ratification, if the note was given during his minority. There must be an express promise after he becomes of age, or such acts as are equivalent to a new contract.

INFANCY. — **EMANCIPATION OF MINOR** at the time of executing a note is irrelevant to the issue in a suit on the note, as it does not affect his liability.

C. W. Perry, for the appellant.

Browne and Cummins, for the claimant.

MORSE, J. The plaintiff presented a claim against the estate of Franklin Gallop, deceased, based upon a promissory note for \$110, dated August 22, 1882, payable in one year from date, with interest at ten per cent. The note was signed by William Gallop and Frank Gallop (the deceased), as makers.

The claim was disallowed by the commissioners, and plaintiff appealed to the circuit court for the county of Clare.

Upon the trial in that court, testimony was given on behalf of the defendant tending to show that the note in question was given in place of another note made by Daniel Gallop, and also signed by William Gallop, to plaintiff; and that said Daniel Gallop had offered to pay the first or original note given by him to plaintiff, and had always been ready and willing to pay the same at any time, but said plaintiff had never offered to deliver said original note up to Daniel; and that said note was past due when the note in suit was executed. Further evidence was given on the part of defendant tending to show that, at the time this note was made, Franklin Gallop was a minor, and had never been emancipated by his father, the said Daniel Gallop, and that the contract contained in said note had never been ratified by Frank after attaining his majority; and that Daniel had no knowledge of the note in suit being given to take up the original note.

In rebuttal, the plaintiff introduced testimony tending to show that when the note made by Frank and William was received by him, the original note was delivered over to them, and that it was not in his possession at the time of the trial, and never had been since the note in suit was executed and delivered to him; also evidence tending to prove that, at the time the note in question here was given, the deceased, Franklin Gallop, had been emancipated, and was doing business in his own name for his own benefit, with the consent and approval of his father, and that Daniel authorized Frank to take up the original note, and, at the time, Frank and William were in partnership, and the said note was given in the course of their partnership transactions.

The circuit judge instructed the jury, in substance and effect, that the deceased failing to give notice to the plaintiff during his lifetime, after he became of age (he having lived some two years after he became twenty-one years of age), he could not and would not be bound by his signature to said note, his legal representatives, after his death, could not take

advantage of his silence without offering some proof, at least, that the deceased did not intend to be bound by his contract; and directed a verdict for the plaintiff for the face of the note and interest.

The judgment entry in the circuit court is not correct, or applicable to proceedings of this kind. No error is assigned upon it, but a common-law judgment cannot run against the administrator, or against the property in his hands as such, as it does in this case. The entry should be an allowance or disallowance of the claim, which allowance or disallowance is to be certified to the probate court: See *La Ros v. Freeland*, 8 Mich. 531, 534.

The only errors assigned in the record are to the charge of the court. We think the case should have been submitted to the jury. If the deceased was a minor at the time of the execution of this note, the burden of proof was upon the plaintiff to show that he had ratified it after he attained his majority. It seems from the record that there was evidence tending to prove that deceased had not ratified the contract. The circuit judge was not authorized in law to presume a ratification because of the mere silence of the deceased for two years. There must have been an express promise after he became of age, or such acts as would have been equivalent to a new contract: *Goodsell v. Myers*, 8 Wend. 479; *Wilcox v. Roath*, 12 Conn. 550; *Tucker v. Moreland*, 10 Pet. 58; *Ford v. Phillips*, 1 Pick. 202; *Fetrow v. Wiseman*, 40 Ind. 148; *Tyler on Infancy*, 2d ed., 84, 91, 92; *Minock v. Shortridge*, 21 Mich. 304; *Proust v. Wiley*, 28 Id. 164.

The record in this case is blind and uncertain. It appears that there was evidence tending to show that the original note was delivered over to William Gallop and the deceased, but which one of them took and kept possession of it we are not informed; nor does it appear whether the relation of the deceased to the note sued upon was that of maker, or surety for William. We do not propose, therefore, to discuss what might be the law applicable to facts which may not be facts in the case.

The question whether or not the deceased was emancipated by his father at the time he signed this note had no relevancy to the issue. It could not affect his liability upon this note.

The judgment of the court below is reversed, and a new trial granted, with costs of this court to defendant.

CONTRACTS BY INFANTS—SUBSEQUENT RATIFICATION.—This subject is fully discussed in a note to *Tobey v. Wood*, 25 Am. Rep. 30-32. A contract executed by an infant is not made valid by his mere failure to disaffirm his acts upon his coming of age: *Hill v. Nebus*, 86 Ala. 442. A *feme sole* may ratify or avoid a contract executed by her when she was an infant *feme covert*; so that by accepting a compensation allowed by a decree of court to which she has consented, she may ratify a contract executed by her when a married infant: *Darraugh v. Blackford*, 84 Va. 509. An infant may disaffirm a conveyance made by him by making a subsequent conveyance of the same property when he becomes of age: *Corbett v. Spencer*, 63 Mich. 731; *Vallandigham v. Johnson*, 85 Ky. 288; and so an infant may affirm a conveyance made to him by conveying the property after he becomes of age: *Buchanan v. Hubbard*, 119 Ind. 188. Acquiescence for nine years by infants after coming of age may operate as an estoppel to deny or question a family settlement made with reference to their interests, in the absence of fraud: *Teipel v. Vandervoort*, 36 Minn. 443. An infant can disaffirm a contract whereunder he has procured goods on his own account, but after he has disaffirmed and brought action to recover purchase price by him paid, he cannot hold the goods as against the vendor: *Shirk v. Shultz*, 113 Ind. 571. Infants may repudiate their contracts upon coming of age, but must restore the consideration in kind which still remains in their hands: *Abernathy v. Phillips*, 82 Va. 769.

RATIFICATION OF CONTRACTS BY INFANTS after coming of age: *Keil v. Healey*, 84 Ill. 104; 25 Am. Rep. 434; *Gillespie v. Bailey*, 12 W. Va. 70; 29 Am. Rep. 445; *Davis v. Dudley*, 70 Me. 236; 35 Am. Rep. 318; *Oatlin v. Haddox*, 49 Conn. 492; 44 Am. Rep. 249; *Harner v. Dippie*, 31 Ohio St. 72; 27 Am. Rep. 496; *Wales v. Powers*, 43 N. Y. 23; 3 Am. Rep. 654.

DISAFFIRMANCE OF CONTRACTS BY INFANTS after coming of age: *Adams v. Beall*, 87 Md. 53; 1 Am. St. Rep. 379, and cases collected in note 384.

EMANCIPATION OF AN INFANT BY MARRIAGE or otherwise does not enlarge his or her capacity to contract: *Person v. Chase*, 37 Vt. 647; 88 Am. Dec. 630; *Harrod v. Myers*, 21 Ark. 592; 76 Am. Dec. 409; *Chandler v. McKinney*, 6 Mich. 217; 74 Am. Dec. 686; *Adams v. Ross*, 30 N. J. L. 505; 82 Am. Dec. 537.

COX v. WELCHER.

[83 MICHIGAN, 263.]

TAXATION.—**PAYMENT OF TAXES IN ADVANCE**, under no stress of process, is a voluntary payment, and cannot be recovered without statutory permission.

TAXATION.—**INVOLUNTARY PAYMENT OF TAXES** or other claim made under legal duress do not require a specific protest before recovery can be had.

PAYMENT.—**ATTEMPT TO COMPEL PAYMENT**, where there is no legal burden, is a legal injury; and payment made to avoid the seizure and sale of property to pay the wrongful claim can be recovered as an extorted sum for which there was no consideration.

Lester A. Tabor, for the appellant.

Howell and Carr, for the defendant.

CAMPBELL, J. Plaintiff sued to recover back an illegal drain tax paid under protest to defendant, who was about to levy on his property. Defendant himself drew up the protest for plaintiff to sign, which was general, and not specific, as to reasons of illegality. The court below held the protest should have been specific, and directed judgment for defendant.

Our statutes provide that in some cases a person may pay taxes in advance of the time they can be enforced, and do so under protest. This protest, which is made under an exceptional statute, is required to be specific. But such a payment under no stress of process is a voluntary payment, and could not be recovered back without statutory permission. Where payments are involuntary, and made under legal duress, there has never been any rule requiring a specific protest. The attempt to compel payment, where there is no legal burden, is regarded as a legal injury; and payment made to avoid the seizure and sale of property to pay the wrongful claim can be recovered back as an extorted sum for which there was no consideration. The principle is so familiar, under our own decisions, as to need no citation of cases. The court below did not draw the proper line between voluntary and involuntary payment. Plaintiff should have been allowed to recover.

Judgment must be reversed, and a new trial granted.

PAYMENT — WHAT PAYMENT IS COMPULSORY: *Vick v. Shinn*, 49 Ark. 70; 4 Am. St. Rep. 26, and cases in note 30; *Orleans County Nat. Bank v. Moore*, 112 N. Y. 543; 8 Am. St. Rep. 775; extended note to *Peters v. Railroad Co.*, 51 Am. Rep. 820-833. A payment is ordinarily involuntary and recoverable when made to an officer having power immediately to enforce collection: *Taylor v. Hall*, 71 Tex. 213.

PAYMENT — WHAT IS VOLUNTARY PAYMENT, AND THE EFFECT THEREOF: *Gould v. McFall*, 118 Pa. St. 456; 4 Am. St. Rep. 606, and note 608. One paying under protest illegal rates for the transportation of goods can recover them: *Peters v. Railroad Co.*, 42 Ohio St. 275; 51 Am. Rep. 814. Payment to an officer who has no immediate authority to enforce collection is voluntary: *Taylor v. Hall*, 71 Tex. 213. Payment by an attachment defendant, knowing all the facts in the case, for the purpose of releasing the attachment, under an agreement that plaintiff should repay the money if defendant should show that he did not owe plaintiff, is not a voluntary payment: *Lyman v. Lauderbaugh*, 75 Iowa, 481.

PAYMENT OF TAXES. — Payment of a personalty tax under protest prior to January 1, 1886, in Michigan, without any demand therefor, or any actual or threatened levy, is a voluntary payment, and not recoverable: *Baker v. City of Big Rapids*, 65 Mich. 76. Taxes on personalty paid on an excessive valuation are paid under legal pressure, and are recoverable, because their payment was involuntary: *Balcock v. Township of Beaver Creek*, 64 Id.

601; so taxes paid on realty not owned or listed to plaintiff, to satisfy which plaintiff's personalty was seized, may be recovered back, on the ground that the payment was involuntary: *Babcock v. Township of Beaver Creek*, 65 Id. 479. In Massachusetts, no action can be maintained to recover back money paid for taxes under protest, a part only of which is legal; and the only remedy in such a case is to have the illegal part of such taxes abated: *Richardson v. Boston*, 148 Mass. 506; compare *Diefenthaler v. Mayor etc. of New York*, 111 N. Y. 331. An involuntary payment of taxes under a mistake of law may be recovered back: *City of Newport v. Ringo*, 87 Ky. 635; and a payment of taxes may be said to be involuntary, where, upon refusal to pay, the collector has authority to levy upon and sell the property: *Louisville etc. R.R. Co. v. Hopkins County*, 87 Id. 605.

ALTMAN v. RITTERSHOFER.

[68 MICHIGAN, 297.]

NEGOTIABLE INSTRUMENTS. — A written promise to pay a certain sum on a certain day, "and attorney's fees," is not a negotiable promissory note.

NEGOTIABLE INSTRUMENTS. — The certainty requisite to the negotiability of an instrument must continue until the obligation is discharged, and any provision which, before that time, removes such certainty prevents the instrument being negotiable at all.

Simonson and Gillett, and Courtwright, for the appellants.

T. A. E. and J. C. Weadock, for the defendant.

LONG, J. It is conceded that, unless the written instrument upon which suit is brought is a negotiable promissory note, the plaintiffs cannot recover. It reads as follows: —

"\$130.

BAY CITY, MICHIGAN, October 17, 1885.

"Six months after date I promise to pay to the order of M. Cohn one hundred and thirty dollars, at the Bay National Bank of Bay City, Michigan, for value received, without any relief whatever from valuation or appraisement laws; with eight per cent interest from date until paid, and attorney's fees.

"FREDERICK RITTERSHOFER."

The instrument is indorsed "M. Cohn."

A promissory note is an unconditional written promise, signed by the maker, to pay absolutely and at all events a sum certain in money, either to the bearer, or to a person therein designated or his order.

The only question upon the negotiability of this instrument is, whether the words "and attorney's fees" added thereto render the sum to be paid uncertain.

This precise question has been passed upon by the courts of many of our sister states, and we are aware that there is much conflict of opinion upon the point; some of the courts holding that the stipulation to pay attorney fees relates merely to the remedy, and that an instrument may be negotiable if the amount with which it may be discharged at maturity be fixed and certain, even though the amount required to discharge it after it has passed maturity, or recoverable upon it in an action, be entirely indefinite and uncertain: *Sperry v. Horr*, 32 Iowa, 184; *Seaton v. Scovill*, 18 Kan. 433; 26 Am. Rep. 779; *Gaar v. Louisville Banking Co.*, 11 Bush, 180; 21 Am. Rep. 209; *Stoneman v. Pyle*, 35 Ind. 104; 9 Am. Rep. 637.

Courts of some of the other states have held to the same doctrine. In the case of *Jones v. Radatz*, 27 Minn. 240, the supreme court of Minnesota held the following not a negotiable promissory note:—

"\$135.

ST. PAUL, September 7, 1878.

"Three months after date we, or either of us, promise to pay to H. K. White & Co., or bearer, \$135, payable at the Second National Bank of St. Paul, Minnesota, for value received, with 12 per cent interest per annum from date, and reasonable attorney's fees, if suit be instituted for the collection of this note.

[Signed]

"____."

Chief Justice Gilfillan, in this case, said: "The instrument before us has this certainty as to the \$135 and the interest. But the whole instrument must be taken together. The promise to pay the \$135 and interest is not the whole of the promise,—not the entire obligation created. The entire promise and obligation is to pay absolutely that sum and interest, and in a particular contingency, to wit, the bringing suit by the payee after default, to pay a further amount not fixed, and not capable of being ascertained from the instrument itself."

And in speaking of the suggestions in some of the cases that a stipulation to pay attorney's fees in case of suit relates merely to the remedy, he says: "For the payee, if he recover on that part of the promise, must recover, not because he is obliged to bring suit, but because it is part of the contract and obligation of the maker, on which the suit is brought, that he will pay them upon the specified contingency."

The supreme court of Pennsylvania, in the case of *Woods v. North*, 84 Pa. St. 407, 24 Am. Rep. 201, held the following instrument not to be a negotiable promissory note:—

"\$377. HUNTINGDON, PENNSYLVANIA, May 5, 1875.

"Sixty days after date I promise to pay to the order of W. H. Woods, at the Union Bank of Huntingdon, three hundred and seventy-seven dollars, and five per cent collection fee if not paid when due, without defalcation, value received.

"SAMUEL STEFFEY."

Indorsement: "W. H. Woods."

In this case Justice Sharswood said: "In the paper now in question, there enters, as to the amount, an undoubted element of uncertainty. . . . If this collateral agreement may be introduced with impunity, what may not be? It is the first step in the wrong direction which costs. These instruments may come to be lumbered up with all sorts of stipulations, and all sorts of difficulties, contentions, and litigation result."

In *Cayuga Bank v. Purdy*, 56 Mich. 6, this court held the following not a negotiable promissory note:—

"366.66. COLDWATER, MICHIGAN, February 27, 1883.

"On the first day of November, 1883, we, the undersigned, whose post-office address is Algansee, county of Branch, and state of Michigan, jointly and severally, for value received, promise to pay E. M. Birdsall and Company, or order, three hundred sixty-six 66-100 dollars, with interest at seven per cent per annum, if paid when due; if not so paid, then the interest shall be ten per cent per annum from date. We also agree to pay exchange and all expenses, including attorney's fee, incurred in collecting, payable at the First National Bank in Coldwater, Michigan. We do hereby relinquish and waive the benefits of all laws exempting real and personal property from levy and sale, and all benefit or relief from valuation and appraisal laws.

"GEORGE R. PURDY.

"ELNATHAN GEORGE."

Mr. Justice Champlin, in this case, says: "The modern tendency to interpolate into such instruments engagements and stipulations not recognized by the law merchant, affecting the certainty as to the amount due and payable thereon, or the time of maturity, . . . should be discountenanced, and held to destroy their negotiability, and deprive them of the character of promissory notes, and they should be relegated to the domain of ordinary contracts."

We see no good reason to depart from this principle. We think the certainty requisite to the negotiability of the instrument must continue until the obligation is discharged, and

that any provision which before that time removes such certainty prevents the instrument being negotiable at all: *First Nat. Bank v. Bynum*, 84 N. C. 24; 37 Am. Rep. 605; *Maryland etc. Co. v. Newman*, 60 Md. 584; 45 Am. Rep. 750; *Garretson v. Purdy*, 3 Dak. 178; *Stevens v. Johnson*, 28 Minn. 172. These cases and many others which we have examined uphold this principle.

I have carefully examined the authorities cited in plaintiffs' brief, and note the argument made by plaintiffs' counsel in the brief, but cannot accede to the doctrine for which they contend. The better reasoning, in my judgment, holds such instruments non-negotiable. The direction of the court to the jury to return a verdict for defendant was correct.

Judgment is affirmed, with costs.

NEGOTIABLE INSTRUMENTS — ATTORNEY'S FEE. — As to the effect of stipulations for attorney's fees written in promissory notes: *Bowie v. Hall*, 69 Md. 433; 9 Am. St. Rep. 433, and particularly note 436.

NEGOTIABLE INSTRUMENTS, ESSENTIALS OF NEGOTIABILITY: See extended note to *Woolley v. Sergeant*, 14 Am. Dec. 422 et seq.

SUTTON v. BECKWITH.

[68 MICHIGAN, 303.]

NEGOTIABLE INSTRUMENT — EVIDENCE. — In an action on a note purchased before maturity, with knowledge that the true consideration is an agreement by a certain association to sell a certain amount of oats before the note should be payable, evidence that the maker of the note took initiatory steps toward joining another association of the same kind is irrelevant, and should be rejected.

NEGOTIABLE INSTRUMENT — NOTE — CONTEMPORANEOUS AGREEMENT — RIGHT OF PURCHASER BEFORE MATURITY. — An agreement made at the time of the execution of a note, forming its real consideration, and to be performed before its maturity, is a part of the same contract, and, between the original parties to the note, cannot be enforced until the agreement is performed; and a purchaser of such note before maturity, and before the time of performance of the agreement, with notice and knowledge of its relation to the note, is bound by it the same as if it were attached to the note or written upon the same piece of paper.

CONTEMPORANEOUS INSTRUMENTS made at the same time, and having relation to the same subject-matter, must be taken to be parts of one transaction, and construed together, to show the true contract between the parties.

NEGOTIABLE INSTRUMENTS — NOTE — PURCHASER BEFORE MATURITY — ESTOPPEL. — Where the maker of a note says to a purchaser before maturity that the note is all right, and that he will pay it when due, he is estopped from asserting failure of consideration, or pleading any other invalidity against the note, if the purchaser relied upon his statement.

Barlow and Loveridge, for the appellant.

Milo D. Campbell, for the plaintiff.

MORSE, J. On the first day of March, 1885, the defendant executed and delivered to one George Cole, of Dundee, Michigan, the following promissory note:—

"400.

March 1, 1885.

"One year after date I promise to pay to W. H. Elson or bearer four hundred dollars, value received, with seven per cent interest per annum. "CHARLES S. BECKWITH."

At the time this note was given, forty bushels of Bohemian oats, at a called price of ten dollars per bushel, were then and there delivered by said Cole to the defendant. Cole gave back at the same time the following agreement to the defendant:—

"ALGANSSEE TOWNSHIP, BRANCH COUNTY,
"STATE OF MICHIGAN.

"We do hereby agree to sell eighty bushels of Bohemian oats for Charles Beckwith, at ten dollars per bushel, on or before the twenty-fifth day of January, 1886. The note given by Charles S. Beckwith to W. H. Elson will not be called for until the above amount is sold at ten dollars per bushel.

"JO. R. STRAYER."

The plaintiff brought suit upon this note in the circuit court for Branch County. The defendant pleaded the general issue, with a notice that the note was given upon the express consideration as set forth in said agreement or bond; that the note was in fact given to the Michigan Bohemian Oat Association, and that the bond entered into and was a part of the transaction of the giving of the note, and in fact the principal part of the consideration of the note; that it was distinctly agreed that said note should not be called for until said association had sold eighty bushels of Bohemian oats, at ten dollars per bushel, for the defendant; that neither said association nor said Jo. R. Strayer, nor any person, sold the said eighty bushels of oats for the defendant; and that in fact the consideration of said note to that extent has failed.

That the plaintiff had full and perfect knowledge of all the matters above set forth before he purchased said note, and had notice of the want of consideration therefor, and purchased such note, if he purchased it at all, with full knowledge thereof; also that defendant would show an entire failure of consideration for said note, of which the plaintiff had notice.

The plaintiff had judgment for the full amount of the note, and interest. The evidence established the fact that, before the purchase of the note by the plaintiff, he sent his cashier or agent to see the defendant, who informed the said agent of the circumstances of the giving of the note, and showed him the bond.

The plaintiff gave evidence tending to show that afterwards, and before he bought the note, the defendant came into his place of business, and said to him: "The note is all right. I gave the note, and I suppose I am good for it, and I shall pay it when it is due." This was denied by the defendant.

The terms of the bond were never performed, but at the time the plaintiff purchased the note there had been no breach of the bond or agreement, as the time of its performance was yet several months away. At the time of the commencement of this suit the defendant held the bond against Strayer.

The principal error assigned is upon the admission of certain testimony having a tendency to show that, after the execution of this note, the defendant took initiatory steps towards joining and becoming a member of a Bohemian oat association other than the one purporting to give the bond or agreement in this case.

This testimony was objected to as being incompetent, irrelevant, and immaterial. We think the testimony should have been rejected. It could have no possible bearing upon the issue involved. It may have and probably did work in the minds of the jury a prejudice against the defendant.

The counsel for plaintiff argues that, admitting that the admission of this evidence was erroneous, yet it could have done the defendant no harm, because the plaintiff, upon the undisputed facts, was entitled to a verdict in any event; that the rejection of this evidence, or striking it out of the case, would not have changed the result, as the plaintiff, without it, was entitled, as a matter of law, to a verdict in his favor.

The counsel insists that, there being no breach of the bond or agreement at the time he became the owner of the note, and purchasing it before due, the instrument could not be robbed of its negotiability, and the plaintiff was entitled to recover, the only defense being upon the bond, and that it had not been fulfilled. He cites a large number of authorities to sustain his position. Many of the cases so cited are not applicable to the state of facts existing in this case. The principal cases tending to support his claim are *Adams v. Smith*, 35 Me.

324; *Kelso v. Frye*, 4 Bibb, 493; *Dow v. Tuttle*, 4 Mass. 414; 3 Am. Dec. 226; and *State Nat. Bank v. Cason*, 39 La. Ann. 865.

In *Adams v. Smith*, *supra*, the note in suit was made to the Protection Insurance Company of New Jersey, or order. Upon the face of the note were the words, "No. Brig Cushnoc." The note was given for a policy of insurance upon the brig Cushnoc, and the policy received for the same contained this stipulation: "In case of loss, such loss to be paid in thirty days after proof of the loss and of interest in the assured, the amount of the note given for the premium being first deducted."

The defendant offered to prove that the brig was his property; that the note was given for insurance upon her; that she was lost within the lifetime of the policy, and before the pay-day of the note; that he had taken the necessary and prerequisite steps to prove and perfect his claim; that his claim under the policy exceeded the amount of the note; and that the stipulation in the policy was known to the plaintiffs at the time of its indorsement to them.

The court hold that the defense was not admissible; "that the note was the property of the insurance company, unpaid and negotiable; and having been transferred to the plaintiffs in the ordinary course of business, by indorsement before its maturity, they are entitled to recover the amount due upon it." No reason other than this is given for the decision.

In *Kelso v. Frye*, *supra*, the note was given for a clock, and a writing, under the hand of the company selling the clock, was executed at the same time as the note, and delivered to the purchaser, warranting the clock, and containing a promise that if the clock should not prove good, the company would either make it good or replace it by a good one. The evidence of this writing was rejected, upon the ground that the performance of this agreement or stipulation could not be construed as a condition precedent to the payment of the note, and that a breach of it must form the basis of a separate action; that the sale of the clock, and not the performance of the stipulation, was the consideration of the note. Whether or not the assignee or holder of the note had notice of this stipulation does not appear in the report of the case.

The case of *Dow v. Tuttle*, *supra*, is the nearest to the present case of any cited upon plaintiff's brief. There the defendant offered to show that, at the time of the making of the note, it

was agreed between the promisor and promisee, and was the condition on which the note was given, that payment should not be demanded until the expiration of five years, and that the promisee would not sell or part with the note. The defendant also offered to read to the jury the following paper, signed by the promisee: "These lines may certify that I, the subscriber, agree with James Tuttle to wait on him for the money due me till he turns his property to the best advantage."

This paper was dated February 15, 1804, and the note February 16th, same year. Defendant offered to prove that this writing was made and signed at the same time with the note, and constituted part of the same contract; that the plaintiff was present, and had full knowledge of all the agreements aforesaid. The evidence was rejected. The agreement offered, outside of the written paper which I have quoted, seems to have rested in parol.

The supreme court of Massachusetts, in passing upon the case, do not refer at all to the paper-writing, but say that "the agreement . . . is not to be considered as a part of the contract with the note. That [the note] is a promise to pay to the promisee, or his order, a sum of money in one year. If the agreement was a part of this contract, it would be repugnant to the note, and destroy its effect. The agreement, although made at the same time, must be considered as a collateral promise of the promisee, for a breach of which, if there be a legal consideration, an action would lie. In chancery, it would be a sufficient ground for an injunction against the plaintiff, proving his knowledge of it before he purchased the note. And at law, perhaps, it may support a motion to stay proceedings, by granting imparlances, until the plaintiff could put it in suit consistent with the agreement. . . . As we consider the agreement as collateral to the note, the evidence was properly rejected."

The editor of the report, in a note to the case, says: "From the evidence, it seems that the two paper writings should, between the original parties, and between the maker and an assignee with notice, have been treated as parts of one entire transaction."

This note agrees, as will be seen hereafter, with the decisions of our court, and seems to me to be sound doctrine.

In *Bank v. Cason*, *supra*, the consideration of the note was admitted to be lawful and valuable. At the time the plaintiff

became the holder of the note there had been no failure of the consideration.

The defense to the note was, that it was given as collateral security for plantation supplies, to be furnished the defendant for the year by the payees of the note; that shortly after its execution, and when only a small part of the supplies had been furnished, the payees failed; that other parties succeeded the payees in the same business, and that ultimately, by the shipment of cotton, the defendant's account for supplies, which the note was given to cover, was fully paid; and that the consideration of the note was known to the bank at the time it became the holder of the note. The note was transferred to the bank before maturity, and for value. The question presented was, whether such knowledge on the part of the bank deprived it of the right to recover on the note. When the bank acquired the note, the consideration had not failed, and the contract between defendant and the payees was being executed, and part of the supplies had been advanced. The court say: "If the consideration be lawful, the knowledge of that consideration can of itself have no bearing on the rights of the transferee. . . . It cannot affect the negotiability of a note that its consideration is to be hereafter realized, or that from some contingency it may never be enjoyed."

There are other authorities tending in the same direction, and to the same effect, of these four cases above noted.

But none of the cases that I have examined seem to meet the circumstances of this case. It is evident that the consideration of the note in suit was not the forty bushels of oats, at ten dollars per bushel, but the agreement or bond executed and delivered at the same time as the note. The transaction, as a whole, appealed to the cupidity of the maker. He was to receive eight hundred dollars for eighty bushels of oats before he was to pay four hundred dollars for the forty bushels delivered to him. This agreement was what he acted and relied upon, and formed the consideration of his note. He would never have given it for the forty bushels of oats, independent of the promise in the bond. The oats he received cut but little figure in the dealing in the mind of the defendant.

Nor was this agreement or bond a collateral undertaking. It was executed at the same time as the note, and a part of the same transaction.

These two papers, so executed, must be taken and construed together. They formed one contract, and, between the original

parties to the note, could not be enforced until the agreement was performed. It has been well settled, in this state and elsewhere, that several instruments made at one and the same time, and having relation to the same subject-matter, must be taken to be parts of one transaction, and construed together for the purpose of showing the true contract between the parties: *Singer Mfg. Co. v. Haines*, 86 Mich. 385; *Smith v. Van Blarcom*, 45 Id. 371; *Dudgeon v. Haggart*, 17 Id. 278; *Eberts v. Selover*, 44 Id. 519; 38 Am. Rep. 278; *Chapman v. Colby*, 47 Mich. 46, 51; *Bronson v. Green*, Walk. Ch. 56; *Makepeace v. College*, 10 Pick. 298, 302; *Jackson v. McKenny*, 3 Wend. 233; 20 Am. Dec. 690.

The negotiation of the note by the payee to the plaintiff was a fraud upon the maker, and nothing but the negotiable quality of the note, as it appeared standing alone, could deprive the defendant of his defense,—of his right to show the whole contract, of which it was only a part: *Smith v. Van Blarcom*, 45 Mich. 378.

If the plaintiff had been a good-faith holder of the note, with no knowledge of the bond, he would have been entitled to recover, because of the negotiable form of the note.

But if he purchased the note before due, and before the time of performance stated in the bond, with the agreement attached to it and forming a part of the contract, he would be obliged, under the law, to take the note as qualified and controlled by the bond or agreement. And if he saw the bond before he purchased the note, and was acquainted with its relation to the note, he must be considered as bound by it, the same as if it had been attached to the note or written upon the same piece of paper. The bond not having been performed, the consideration failed, and the plaintiff could not recover, unless the jury believed his claim that the defendant came to him, or saw him, and told him the note was all right, and he would pay it when it became due. If the defendant said this, or its equivalent, to the plaintiff, he would be estopped, after the plaintiff had bought the note relying upon this statement, from afterwards asserting a failure of consideration or pleading any other invalidity against the note.

For the erroneous admission of testimony heretofore noted, the judgment of the court below must be reversed, with costs, and a new trial granted.

SHERWOOD, C. J. I agree with my brother Morse that the judgment in this case should be reversed. And were the case

one in which the rules governing the law merchant might be invoked, I should agree in most that he has said in the case.

The contract under consideration was a gross fraud from the beginning to the end, and on the part of the parties procuring it, was even worse, — it was criminal in character, — and furnishes no case for the application of the just and equitable principles underlying and controlling commercial law, and to attempt to apply them to a case like this is a perversion of the doctrine; and an appeal to the adjudicated cases establishing this doctrine is only giving colorable dignity to one of the worst swindles perpetrated upon the present generation, and should be treated by all courts as such.

The transaction is one wherein the intention to cheat and defraud is apparent to all upon the face of the contract sought to be enforced, except to the ignorant and unsuspecting, and, in my judgment, is against public policy and void. If there were any doubt upon this subject, the recent legislation in this state making the transaction a felony should be regarded as conclusive.

Certain it is that no person owning and holding or having knowledge of the entire contract can be considered as a *bona fide* holder of the paper, and it is questionable whether a holder of any part of the contract should be so regarded.

The judgment should be reversed, and no new trial should be granted.

TWO OR MORE INSTRUMENTS EXECUTED AT THE SAME TIME, between the same parties, with reference to the same subject-matter, must be construed together as forming but one contract: *Jackson v. McKenny*, 3 Wend. 233; 20 Am. Dec. 690, and note; *Clay v. Draper*, 4 Mass. 266; 3 Am. Dec. 215; *Hills v. Miller*, 3 Paige, 254; 24 Am. Dec. 218, and note; *Isham v. Morgan*, 9 Conn. 374; 23 Am. Dec. 361; *Raymond v. Roberts*, 2 Aiken, 204; 16 Am. Dec. 698; *Dunlop v. Wright*, 11 Tex. 597; 62 Am. Dec. 506; *Hagerty v. White*, 69 Wis. 317; *Mobile etc. Ry Co. v. Gilmer*, 85 Ala. 422. Where two agreements, made at different times, with reference to the same subject-matter, are each complete in themselves, and neither contains any reference to the other, parol testimony cannot be admitted to affect their construction as distinct instruments: *Heenershots v. Gallagher*, 124 Pa. St. 1. When a husband and wife convey by warranty deed, after previous money negotiations by and between the parties to the deed, and on the same day they make a promissory note to the grantee, and receive from him a title bond with an agreement therein to convey to the husband upon prompt payment of said note, the deed, note, and title bond do not absolutely constitute, as one contract, a mortgage, but parol testimony may show the real nature of the transaction between the parties with reference to said instruments: *Wolfe v. McMillan*, 117 Ind. 587; while contemporaneous writings may be considered in construing a contract, when the writings and the contract are reciprocally

dependent, they cannot be considered for the purpose of showing that the parties did not agree upon a stipulation plainly expressed in writing which purports to be the final and only contract between the parties: *Müller v. Callahan Co.*, 69 Tex. 205. A will executed contemporaneously with a deed may be considered in construing the deed, when they refer to the same subject-matter, and the will is referred to expressly in the deed: *Ames v. Ames*, 117 Ind. 19.

WRITTEN CONTRACTS — CONTEMPORANEOUS AGREEMENTS. — Parties may enter into an oral agreement contemporaneously with a written contract, provided such oral agreement is independent in its nature, and does not vary or contradict the written contract: *Schoss v. Sunderland*, 39 Kan. 758; and parol testimony may show that a writing which is in the form of a complete contract, such as a promissory note, was not to be binding until the performance of some condition precedent resting on parol: *Reynolds v. Robinson*, 110 N. Y. 654. There may be an oral agreement entered into contemporaneously with the execution of a promissory note which forms part of the same general contract: *Tucker v. Tucker*, 113 Ind. 272; such as an agreement that only one of the signers of a note should be bound thereby: *Hefner v. Brownell*, 75 Iowa, 341; or an agreement that one who appears upon the face of a note as promisee should not in fact be such, but an indorsee: *Cagle v. Lane*, 49 Ark. 465.

NEGOTIABLE INSTRUMENTS. — Nothing short of *malá fides* or notice thereof will enable the maker or indorser of negotiable paper to defeat an action thereon by one apparently a regular indorsee: *City Bank etc. v. Perkins*, 29 N. Y. 554; 86 Am. Dec. 332; *Russell v. Haddock*, 3 Gilm. 233; 44 Am. Dec. 693.

LANGTRY v. WAYNE CIRCUIT JUDGES.

(88 MICHIGAN, 481.)

ATTACHMENT. — **JUSTICE'S WRIT OF ATTACHMENT** does not operate as a summons; and service of it personally, without service on property, and service of an inventory as required by statute, is insufficient to give jurisdiction over defendant under the Michigan statute: *Howell's Stats.*, secs. 6839, 6840.

George H. Prentiss, for the relator.

T. S. Jerome, for the respondents.

CAMPBELL, J. Relator asks to have certain proceedings set aside for want of jurisdiction in a justice to render judgment against her on the default which was entered.

Suit was brought against her before a justice of Wayne County by attachment. The ground of the attachment was her non-residence, and no question is made on the sufficiency of the affidavit. The writ is a statutory one, and the form is given in section 6839 of Howell's Statutes. It is upon this that the controversy arises.

The statute declares as follows: "Every attachment shall

state the amount claimed by the plaintiff, and shall command any constable of the county in which the justice resides to attach so much of the goods and chattels of the defendant (except such as are exempt by law from execution), as will be sufficient to satisfy such demand, and safely keep the same to satisfy any judgment that may be recovered by the plaintiff in such attachment, and to return the same at a time herein to be specified, not less than six nor more than twelve days from the date thereof."

It will be observed that the writ contains no summons clause, and that a summons against a non-resident must be made returnable not less than two nor more than four days from the date thereof: Sec. 6830.

Section 6840 provides how an attachment shall be executed. It is to be executed at least six days before the return day, by seizing a sufficient amount of goods and chattels to satisfy the claim and costs, and making an inventory thereof, and serving a copy of said attachment and inventory on the defendant, if found within the county. If defendant is not found in the county, a copy of the attachment and inventory is to be served at defendant's last residence, or on the person in whose possession the goods are found.

By section 6850 it is provided that there shall be no judgment unless,—1. On seizure of property of one or more defendants; or 2. On personal service of process or appearance; or 3. Where a garnishee's liability has been fixed.

Respondents claim that the attachment operates as a summons, and service of it personally is sufficient with or without service on property and service of inventory. Relator claims that the writ is not a summons, and cannot be served except as directed by the statute.

Proceedings by attachment are entirely statutory in their inception, and we must look to the statutes to ascertain their requisites. The form of a summons is given by section 6826, and that contains a distinct warning to the defendant to appear. There is no such warning in the attachment writ, which merely requires a seizure of property for safe-keeping. If the attachment is personally served, the subsequent proceedings are as in case of summons; otherwise, there must be a continuance: Sec. 6846.

The question before us has never been distinctly presented before. In *Borland v. Kingsbury*, 65 Mich. 59, it was held that personal service of the writ and inventory would not give

jurisdiction if the affidavit was insufficient. If the writ could be regarded as a summons, that ruling would have been exceptional. But it rested on the ground that attachment proceedings had no foundation outside of statutes, and must, therefore, in all things essential, conform to them.

The statute concerning attachment proceedings in circuit courts differs from that relating to justices of the peace, by giving a form containing a summons clause, directing the sheriff to summon the defendant, if to be found within his county, or any county where he may have seized property, and the writ is to be tested and returnable like other writs. Except as possibly limited by some other statutory conditions, this does not differ from any other mesne process, and is a qualified summons.

The difference between the two classes of writs of attachment cannot be regarded as accidental. It is a radical difference in the exigency of the writ, which must have some effect given to it. And the statute expressly declares how personal service is to be made, which is only made after levy and inventory, and by service of a copy of that with the writ. When reference is afterwards made to giving judgment in case of personal service, it must mean the personal service just mentioned, made after property is levied upon.

The policy of the statute in regard to non-residents requires that they shall have a speedy hearing, and if actually summoned, they have no delay beyond four days to keep them from going to trial. If an attachment can be made to serve the same end, it would be very easy to evade this, as the affidavit need not state that any property is within the county, and the process might be grossly abused.

In our opinion the service on relator was a nullity, and she should have the relief prayed, and the suit should be dismissed.

ATTACHMENT. — Service of an attachment writ and inventory does not give a justice of the peace jurisdiction over the defendant, if the affidavit was not sufficient; nor is the defect of an insufficient affidavit waived by general appearance: *Borland v. Kingsbury*, 65 Mich. 59. An attachment issued, before a summons is issued or a warning order is made, is void and confers no jurisdiction to sell land belonging to defendants who were constructively summoned after it was issued: *Keller v. Stanley*, 86 Ky. 240.

McNAMARA v. GARGETT.

[68 MICHIGAN, 454.]

CONTRACTS — CONTEMPORANEOUS WRITINGS — CONSTRUCTION. — Where two writings are executed and delivered at the same time, and relate to the same subject-matter, they must be construed together in determining the contract between the parties.

NEGOTIABLE INSTRUMENTS. — FALSE REPRESENTATION by the payee of a note to the maker that a certain association on whose behalf he executed a bond, forming the consideration for the note, was duly incorporated under the statute, is a material representation, and if acted upon by the maker as an inducement in executing the note, avoids it in the hands of the payee, or in the hands of a purchaser before maturity with notice.

CONTRACTS — CONSIDERATION — GAMBLING CONTRACT VOID AS AGAINST PUBLIC POLICY. — The taking of bonds, notes, or other evidences of indebtedness in whole or part consideration of bonds, contracts, or other agreements, for the sale of grain, seeds, or other cereals at a fictitious price, are gambling contracts, and void as against public policy between the original parties and purchasers with notice.

CONTRACTS — VALIDITY — PUBLIC POLICY. — Contracts which are at war with the established interests of society, and in conflict with the morals of the time, are void as against public policy, and the fact that individuals may suffer can in no manner affect the question, as their interests must be subservient to the public welfare.

CONTRACT — VALIDITY — PUBLIC POLICY. — If any part of the consideration of a contract is illegal, the whole contract is void as against public policy, although the illegal act or promise is coupled with one which is legal.

T. W. Whitney and C. J. Willett, for the appellant.

James K. Wright, George P. Stone, and James L. Clark, for the plaintiff.

LONG, J. Plaintiff brought suit in the circuit court for Gratiot County against the defendant, by declaration upon the common counts in *assumpsit*, with copy of note attached. The note reads as follows: —

“\$125.

SUMNER, October 21, 1885.

“Fourteen months after date, I promise to pay A. A. Griffith or bearer one hundred and twenty-five dollars, value received, with interest at seven per cent per annum.

“W. J. GARGETT.”

The defendant pleaded the general issue, and gave notice “that the defendant above named, on the trial of this cause, will give in evidence, under the general issue above pleaded, and insist in his defense, that said note above set forth in plaintiff’s declaration was given without consideration; that said note was a Bohemian oat note; that same was procured from defendant by deceit and fraud, and that the same was

fraudulent, and void at its inception; that the consideration of said note was void, on the ground of public policy; that said note was obtained from the defendant for an illegal purpose by the payee named therein; that the consideration for which said note was given was an impossible consideration, and that could not be legally carried out without a breach of the law, and by perpetrating a fraud," etc.

The cause came on for trial before the court without a jury, and the court made a finding of facts and law as follows:—

"On October 21, 1885, the defendant, William J. Gargett, purchased of one A. A. Griffith twenty-five bushels of Bohemian oats, agreeing to pay therefor ten dollars a bushel, making a total of \$250; for the payment of one half of which sum he executed to said Griffith the promissory note in suit, of which the following is a copy:—

"\$125.

SUMNER, October 21, 1885.

"Fourteen months after date, I promise to pay A. A. Griffith or bearer one hundred and twenty-five dollars, value received, with interest at seven per cent per annum.

"Due December 24, 1886.

"W. J. GARGETT.

"P. O. address, Elm Hall, Mich.

The oats were delivered, and with them an obligation, partly printed and partly written, which entered into and formed a part of the contract, and executed by said Griffith as superintendent, of which the following is a copy:—

"No. 340.

"A BOND FROM THE LENAWEE, CLINTON, AND GRATIOT COUNTY
BOHEMIAN OAT ASSOCIATION.

"(To be Signed by Our Superintendent, A. A. Griffith.)

"We hereby agree to sell fifty bushels of Bohemian oats at ten dollars per bushel for Mr. William J. Gargett, of Sumner township, Gratiot County, state of Michigan, on or before the twenty-first day of October, 1886. Said W. J. Gargett is to pay the L., C., and G. Association twelve and a half per cent for bonding said oats, if he sells them himself, or twenty-five per cent for selling and bonding, in cash, upon presentation of the orders and bonds. And the first oats sold by this or any other association, or by the owner, or any one else, shall be applied to the redemption of this bond.

"A. A. GRIFFITH, Supt.

"For feeding or consumptive purposes, the oats were not worth much more than ordinary oats; and the defendant

knew they were not worth ten dollars a bushel, at the time of making the contract, for feeding purposes. He purchased them for the purpose of raising that kind of grain, and selling the whole or some portion again. He would not have made the purchase but for the bond or obligation above mentioned, and expected to pay the note if the association did as it agreed to do, as expressed by the bond or obligation. The testimony does not show whether or not the oats were raised or furnished by Mr. Gargett with which to redeem the bond. But the grain mentioned in the bond never was sold or bonded by or for defendant.

"The evidence that there was such an association as above mentioned is found on the face of the bond or obligation. The parties selling the oats claimed that the association giving the bond or obligation was an incorporated company.

"Michael McNamara, the plaintiff, became the owner of the note by purchase about ten days after it was given, and long before its maturity, paying therefor its full face value. But at the time of the purchase he knew it was given for Bohemian oats, and knew of the nature of the contract that was made for which the note was given.

"The note and interest amounts to \$142.50.

"Let a judgment be entered in favor of the plaintiff, and against the defendant, for the sum of \$142.50.

"Also, let an order be entered staying execution, and that the defendant may have twenty days in which to remove this case to the supreme court.

"HENRY HART, Circuit Judge."

Judgment was entered in said court on the above findings on November 4, 1887, and the defendant brings error, and claims,—"1. That the findings of fact do not support the judgment; 2. That the judgment should have been rendered for the defendant."

From the facts found by the court, the plaintiff stands in no better position towards this note than the payee would have stood had he brought the suit in his own name. The court found that "Michael McNamara, the plaintiff, became the owner of the note by purchase about ten days after it was given, and long before its maturity, paying therefor its full face value. But at the time of the purchase he knew it was given for Bohemian oats, and knew of the nature of the contract that was made for which the note was given."

We can construe the language of this finding in no other

light than that the plaintiff knew, before he paid his money on the purchase of this note, that the payee named in the note, at the time he obtained it from the defendant, made, executed, and delivered to the defendant the bond or writing set out in the findings; and that A. A. Griffith, the payee named, represented by such writing that he was the superintendent of the Lenawee, Clinton, and Gratiot County Bohemian Oat Association, and that Griffith had by such writing agreed to sell for the defendant fifty bushels of Bohemian oats, at ten dollars per bushel, on or before October 21, 1886,—that is, two months before said note, by its terms, was to become due.

These two papers were made, executed, and delivered at the same time, and are to be construed together in determining the contract between the parties: See *Sutton v. Beckwith*, 68 Mich. 310, and cases there cited; *ante*, p. 344.

The court also found that Griffith further represented that this Bohemian Oat Association was an incorporated company. All these representations, the court finds, were made known to the plaintiff before he purchased the note.

There is no statute in this state authorizing the incorporation of any such company, and the representation made by Griffith to the defendant that this so-called Bohemian Oat Association was an incorporated company was false, and known by this superintendent to be false at the time of procuring this note. It was a material representation, and one of the inducements to defendant to make his note and take this bond; and the court finds, from the evidence produced on the trial, "that the defendant would not have made the purchase but for the bond or obligation mentioned,"—that is, the bond of a corporation which Griffith, the payee in the note, falsely induced the defendant to believe was an incorporated company, one which existed by authority of some act of the legislature of this state. This fact would have defeated the recovery of the payee upon the note, and these facts, all being known to the plaintiff before he paid a dollar for the note, must be held to defeat his recovery.

Is this contract also void on the ground of public policy? The defendant gave to Griffith one hundred and twenty-five dollars in money, and his note for one hundred and twenty-five dollars, payable fourteen months from date, with seven per cent interest, and received from said Griffith twenty-five bushels of Bohemian oats (which the court finds were worth not much more than ordinary oats), and an agreement in

writing, signed by Griffith, promising to sell, on or before one year from date, fifty bushels of Bohemian oats for the defendant at ten dollars per bushel, and to receive upon such sale a commission of twenty-five per cent if the company which Griffith represented made the sale, and twelve and one half per cent commission if the defendant made the sale, or found the purchaser, at ten dollars per bushel; and the court finds "that the defendant would not have made the purchase but for such bond or obligation."

The carrying out of this obligation on the part of Griffith meant the finding of another victim, within one year, who would take fifty bushels of Bohemian oats at ten dollars per bushel, upon the giving to him of a contract to sell for him, the next year after, one hundred bushels at ten dollars per bushel, and so on *ad infinitum*, and increasing the number of bushels to be sold each year in geometrical progression; and from this contract alone, on the tenth year, the enormous amount of the sale must be twenty-five thousand six hundred bushels at ten dollars per bushel, if this contract is carried out. The court cannot shut its eyes to the fact that this is only one of the thousands of similar contracts made within this state within the last few years, and that the unwary, unsuspecting, and too credulous farmers have been made the victims of sharpers and swindlers, who, by their seductive arts, have worked upon the natural love of gain which most men possess, and thus reaped a rich harvest from those whom the law should protect. The very scheme itself bears evidence upon its face that it is a fraud and a snare, and yet so cunningly devised that, in the hands of a sharp, shrewd, and designing man, hundreds of the unwary have been defrauded; and the courts should set their seal of condemnation upon it, and pronounce it, as it is, a contract void on the ground of public policy. It is upon its face a gambling contract.

Mr. Greenhood, in his work on public policy, says: "By public policy is intended that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good, which may be termed the policy of the law, or public policy in relation to the administration of the law. The strength of every contract lies in the power of the promisee to appeal to the courts of public justice for redress for its violation. The administration of justice is maintained at public expense; the courts will never, therefore, recognize any transaction which,

in its object, operation, or tendency, is calculated to be prejudicial to the public welfare."

Walker, J., in *Hotszger v. Cleveland* (Marion superior court, Indiana), 8 Ind. Law Mag. 42, 50, speaking upon this question, says: "We may take it as well settled that, in the law of contracts, the first business of the courts is to look to the welfare of the public; and if the enforcement of the agreement would be inimical to its interests, no relief could be granted to the party injured, even though it might result beneficially to the party who made and violated the agreement."

Mr. Story says: "Public policy is in its nature so uncertain and fluctuating, varying with the habits and fashions of the day, with the growth of commerce and the usages of trade, that it is difficult to determine its limits with any degree of exactness. It has never been defined by the courts, but has been left loose and free from definition in the same manner as fraud. This rule may, however, be safely laid down, that wherever any contract conflicts with the morals of the time, and contravenes any established interest of society, it is void, as being against public policy": Story on Contracts, sec. 675

Some of the courts, speaking upon this subject, have said that the immediate representatives of the people, in legislature assembled, would seem to be the fairest exponents of what public policy requires, as being most familiar with the habits and fashions of the day, and with the actual condition of commerce and trade, their consequent wants and weaknesses; that legislation is least objectionable, because it operates prospectively, as a guide in future negotiations, and does not, like a judgment of a court, annul a contract already concluded.

Such contracts in this state have already had the seal of condemnation stamped upon them by the legislative branch of the state government by act No. 20, laws of 1887, being "an act to prevent the taking of bonds, promissory notes, and other evidences of indebtedness, in whole or part consideration of bonds, contracts, and other agreements for the sale of grain, seeds, and other cereals at a fictitious price, and to prevent the sale and transfer of such evidences of indebtedness, and to provide a punishment therefor."

This act may at least be taken as an exponent of public disapproval of all such contracts.

The argument that holding such contracts void on the ground of public policy annuls a contract already concluded,

has no force. If the contract is at war with the established interests of society, and is in conflict with the morals of the time, the fact that individuals may suffer can in no manner affect the question, as the interests of individuals must in many cases be subservient to public welfare. It is essentially a gambling contract, and one impossible to be performed. The contract is that Griffith shall sell for Mr. Gargett fifty bushels of his (Gargett's) Bohemian oats, at ten dollars per bushel, on or before October 21, 1886. No man can, in legal contemplation, force the sale of another's property by a given day, or by any day, by his own act: *Stevens v. Coon*, 1 Pinn. 357.

These oats were worth no more than any other oats, for any useful purpose, and Griffith knew that these oats, at any time up to October 21, 1886, could not be sold legitimately for more than any other oats, and that they could not be sold for ten dollars per bushel in any legitimate and lawful transaction; that the only way in which they could be so sold was by the perpetration of another and similar fraud upon some other unsuspecting victim to his arts and wiles. The contract is one that Gargett could not have enforced, had Griffith failed to call for and sell the oats. In such cases the courts must leave the parties where it finds them. If either party has, however, been defrauded, he may have his action for the fraud, but could not enforce the contract.

It is said, however, that Gargett received twenty-five bushels of oats, and ought not to be permitted to complain, as there is not a total failure of consideration. But the trouble is, the whole contract is tainted and avoided by the part of the consideration which is illegal. If any part of the consideration is illegal, the whole consideration is void, because public policy will not permit a party to enforce a promise which he has obtained by an illegal act or promise, although he may have connected with the act or promise another which is legal: 1 *Parsons on Contracts*, 457; *Snyder v. Willey*, 33 Mich. 496.

Had the note gone into the hands of a *bona fide* holder, — one who purchased for value before maturity, and without notice of the consideration for which it was given, — the principles which we have laid down would not apply. It is not intended to run counter to the rules of the law merchant governing negotiable instruments, but we have taken the note and bond together as forming the contract between the parties; and construing them together, as though written upon

the same piece of paper, and as between the original parties and those purchasing with notice, we hold such contracts void.

The judgment of the court below must be set aside, and judgment entered in this court in favor of defendant, with costs of both courts.

CONTRACTS. — TWO INSTRUMENTS EXECUTED AT THE SAME TIME, between the same parties, with reference to the same subject-matter, must be construed together as constituting but one entire contract: *Sutton v. Beckwith*, 68 Mich. 303; *ante*, p. 344, and cases collected in note.

CONTRACTS AGAINST PUBLIC POLICY. — As to contracts to deal in futures or margins, their validity, and the enforcement of relations growing therefrom: *Sondheim v. Gilbert*, 117 Ind. 71; 10 Am. St. Rep. 23, and particularly note 33, 34. The device denominated "bucket-shop," purporting to be an actual dealing in grain, but in fact being merely a wager on the market price of grain at some specified future date, is gambling, and illegal: *Smith v. Western Union Tel. Co.*, 84 Ky. 664. The question of grain-gambling is one for the jury, and when they find that a grain deal is a gambling contract, their finding is generally conclusive: *Washer v. Bond*, 40 Kan. 84.

FRAUD, TO VIOLATE A CONTRACT, must consist of a false representation of a material fact: *Finlayson v. Finlayson*, 17 Or. 347; 11 Am. St. Rep. 836; *Lewark v. Carter*, 117 Ind. 206; 10 Am. St. Rep. 40, and note 45; *Albitts v. Minneapolis etc. R'y Co.*, 40 Minn. 476. No representation can amount to an actionable fraud, which is not relied upon by the party claiming to have been defrauded: *Moses v. Katzenberger*, 84 Ala. 95.

BRAND v. HINCHMAN.

[68 MICHIGAN, 500.]

MALICIOUS PROSECUTION. — The malicious prosecution of a civil suit, and especially the swearing out of a false attachment without probable cause, is actionable, without an arrest or seizure of property.

MALICIOUS PROSECUTION OF ATTACHMENT SUIT. — In order to maintain an action for the malicious suing out of a writ of attachment, it is not necessary that the attachment must have been discharged, or otherwise terminated in favor of plaintiff; nor is the settlement of the debt by him, and the payment of costs, a bar to the maintenance of an action for malicious prosecution, if the attachment was malicious and without probable cause.

MALICIOUS PROSECUTION — CONSTRUCTIVE SERVICE OF MALICIOUS WRIT OF ATTACHMENT. — The act of an officer in going into plaintiff's store with a writ of attachment, showing it to him, and remaining there for the purpose of preventing any goods going out, is such constructive service of the writ or taking possession of the goods as will support an action of malicious prosecution, if the writ is sued out maliciously.

MALICIOUS PROSECUTION. — PROBABLE CAUSE for suing out a writ of attachment is such cause as the generality of business men of care and prudence would act upon under like circumstances; and the fact that

plaintiff in an action of malicious prosecution neglected to pay the debt, or was careless in the conduct of his business, is not sufficient to justify the belief that he is about to dispose of or conceal his property with intent to defraud his creditors. Such probable cause must be founded on competent evidence, and unless so founded, the suing out of the writ of attachment is malicious, and the jury must so find.

MALICIOUS PROSECUTION. — WANT OF PROBABLE CAUSE in itself raises a presumption of malice.

MALICIOUS PROSECUTION — PROBABLE CAUSE. — If defendant in an action for malicious prosecution for maliciously suing out a writ of attachment honestly believed that he had probable cause, he would not be liable, though in reality there was no probable cause; but the jury must determine whether he honestly believed that he had probable cause, and this can be determined only by ascertaining what careful and prudent men would have done under like circumstances.

MALICIOUS PROSECUTION — EVIDENCE. — In an action for malicious prosecution in maliciously suing out a writ of attachment, evidence that notice of the attachment was published in a newspaper, and of the circulation of such paper, is admissible, as tending to show the publicity given the matter and the business injury resulting therefrom.

MALICIOUS PROSECUTION — EVIDENCE. — In an action for malicious prosecution in maliciously suing out a writ of attachment, evidence is admissible to show that plaintiff's business reputation was good before the writ was sued out, and the jury must determine whether a refusal of credit was attributable to that or to other causes.

Griffin, Warner, Hunt, and Berry, for the appellants.

Henry M. Duffield, for the plaintiffs.

MORSE, J. Plaintiffs sued defendants for a malicious prosecution of an attachment suit, and recovered verdict and judgment for \$625, in the circuit court for the county of Wayne.

On the fourth day of August, 1885, John M. Hinchman, one of the defendants, and in their behalf, made affidavit and obtained a writ of attachment in the superior court for the city of Detroit against the plaintiffs. The affidavit alleged that the plaintiffs were indebted to the Hinchmans in the sum of \$473.11 over and above all legal set-offs, and that the same was due upon express contract; also that the said plaintiffs, as the deponent in the affidavit had good reason to believe, were about to assign their property, or dispose of it, with intent to defraud their creditors, and were about to conceal their property, or some part thereof, with intent to defraud their creditors.

The writ was left at the sheriff's office, and put in the hands of a deputy for service. This deputy, with another officer, proceeded to the store of the plaintiffs between the hours of two and three o'clock in the afternoon of the day the writ issued.

He saw one of the plaintiffs, Mr. Brand, sitting at the desk, and informed him that he had a writ of attachment in favor of Hinchman and Sons, the defendants in this action, and against plaintiffs. He exhibited the writ to Brand. Brand said the matter was settled, and asked time to see Hinchman and Sons, or their attorneys, which was granted. The officer swears that he told Brand he would stay in the store until he returned, and would make no levy. He testifies further that he made no levy, and did not take possession of the store or any of the goods therein. He claims that he remained in the store not more than half an hour, when Mr. Berry, a clerk in Hinchman and Sons' attorney's office, came and told him to go out, as the matter was arranged. He claims he did not serve the writ.

The writ was returned by the sheriff August 13, 1885, with the following indorsement by the attorneys for Hinchman and Sons:—

"To the Clerk: Please enter an order discontinuing this case."

The return was as follows:—

"By direction of the plaintiffs' attorneys, I hereby return the within writ without service, the case having been discontinued.

GEORGE H. STELLWAGEN.

"By H. H. TRAINOR, Deputy Sheriff."

On the tenth day of August, 1885, the plaintiffs in this suit paid the debt to Hinchman and Sons, and seven dollars as costs of suit. Mr. Brand testifies that the officer showed him the writ, and said he had an attachment against his goods. Brand left the officers in the store when he went to see Hinchman and Sons. They were gone when he returned. Mr. McCullough swears that he came to the store soon after Mr. Brand went out. The officers were in the store when he arrived, and remained there about half an hour after he came. The officers said nothing to him about the attachment, but he suspected it.

It appears clearly enough, from all the evidence, that no formal levy or service of the attachment was made, and no manual possession or disturbance made of the goods; yet the officers virtually had a possession of the store while they stayed there, and one of them testified that, had any one attempted to remove any of the goods out of the store, he should have interfered and prevented it.

Some evidence was introduced as tending to show damages, as follows:—

Plaintiffs had been, before this, doing business with J. C. Wemple & Co., of New York, purchasing goods of them on credit. August 12, 1885, they gave an order to this firm, through an agent, for a bill of goods, amounting to \$136, informing him of the attachment proceedings. About a week thereafter they received a letter from Wemple & Co., stating that if plaintiffs would pay cash for the goods they would send them, and give a discount of three or four per cent. The plaintiffs then countermanded the order.

A truckman brought a barrel of glue to the store. He wanted the money for it. No one but a clerk of plaintiffs was at the store. He did not know whether the bill for the glue was correct or not, and would not pay it, and the truckman took the glue away.

It was also shown, under objection, that the following paragraph was published in the Detroit Free Press of August 5, 1885: "In the superior court, yesterday, T. H. Hinchman and Sons swore out an attachment against Charles R. Brand and Gilbert McCullough."

Mr. Brand testified that one Anderson, an architect, told him that he had wished him to figure on a job of Edward Kanter, but thought there was no use, as the architect had heard there was an attachment upon their property, and plaintiffs closed up. When he found out they were all right it was too late, as the bids had been received, and the job let at eleven hundred dollars. Brand was permitted to testify, against objection, that the profits upon the job at eleven hundred dollars would ordinarily be from ten to twenty per cent. "It might be more; it might be less."

The plaintiffs also introduced evidence tending to show that they were solvent, and able to pay their debts at the time of the attachment, and had not assigned, disposed of, or concealed any of their property with intent to defraud their creditors, and had no intention of so doing.

Defendants' counsel, when plaintiffs rested, moved to strike out the testimony in relation to the Wemple transaction and the barrel of glue; also the testimony of A. H. Dey, president of the American Exchange National Bank, who had testified that the plaintiffs were depositors and borrowers at his bank for a number of years, and that he knew nothing against their reputation for honesty and integrity in the community. The

defendants' motion was denied as to all this testimony, and exception taken.

The defendants made no showing as to any facts upon which they based their affidavit for the attachment writ, except that the plaintiffs refused to give Mr. Berry, a clerk in the office of Griffin and Warner, who had the bill of Hinchman and Sons for collection, any statement of their assets and liabilities, and did not meet some of their promises to pay the debt.

John M. Hinchman, who made the affidavit, testified that he, at the time of making it, fully believed that he had good reason to believe as therein stated. He also testified that Brand said, in excuse for non-payment of the bill, that McCullough was frequenting saloons in business hours, and did not attend to business, leaving the whole burden upon him, and Hinchman also thought that he had seen McCullough under the influence of liquor, which influenced his judgment about the matter. On cross-examination he stated that the refusal of Brand and McCullough to give their assets and liabilities to Berry cut no figure, and had no bearing upon his intention or mind when he made the affidavit, and that he had heard nothing of any disposition of property by plaintiffs at that time, and could not remember that he had heard of any concealment of their property with intent to defraud creditors. He was afraid of a chattel mortgage that might be made upon the stock to shut off creditors, but did not remember of hearing any one say that plaintiffs were about to make such a mortgage.

The first objection made by defendants' counsel against this judgment is, that no action for malicious prosecution will lie unless there has been an arrest of the person or a seizure of the property.

The declaration in the case in the first count substantially charged a malicious suing out of the writ without probable or reasonable cause, a seizure of the goods in the plaintiffs' store under said writ, and a possession of the same taken and held for a half-day, disturbing and injuring the business of plaintiffs, and that the defendants withdrew the sheriff from the store upon the promise of the plaintiffs, under compulsion of said levy and attachment, to pay the claim of Hinchman and Sons on a certain day, which payment was duly made by plaintiffs; that the attachment was known to many of the customers of plaintiffs in Detroit and elsewhere, and to the public generally, and to merchants in the cities of Detroit, Bos-

ton, New York, Philadelphia, and elsewhere, with whom the plaintiffs had dealings; and that plaintiffs were thereby greatly injured in their credit and reputation, and put to great expense in obtaining a dissolution of said writ of attachment.

The second count reads as follows:—

“And whereas, also, the said defendants, further contriving, and maliciously and wickedly intending, as aforesaid, heretofore, to wit, at the time and place, and in the manner aforesaid, did falsely and maliciously, and without reasonable or probable cause, sue out and prosecute, and cause to be sued out and prosecuted, the writ of attachment as aforesaid, commanding the sheriff, etc., as aforesaid, and the said sheriff attached certain property of said plaintiffs in the county of Wayne as aforesaid, pursuing the directions of said defendants and their agents, belonging to said plaintiffs, which said property was of great value, to wit, ten thousand dollars; the said defendants wickedly and maliciously intending by said large, excessive, and unnecessary seizure and attachment of said property as aforesaid to injure and annoy said plaintiffs.

“And the said plaintiffs say that by reason of the premises they were greatly injured in their credit and reputation, and put to great inconvenience and expense at, to wit, Detroit aforesaid, and elsewhere, to the damage of the plaintiffs ten thousand dollars.”

While in this case there was no service of the writ, there was at least a technical taking and possession of the property. The officer went in the store to make the levy, and did not go out of it until ordered to by the agent of Hinchman and Sons. He testifies that he should have prevented any one from removing any goods from the building, and he certainly had possession enough to have done so.

But, whether he had such possession or not, I am fully satisfied, from a consultation of the authorities, that the action is maintainable without any arrest or seizure of property.

There are but few, if any, wrongs for which the law does not provide a remedy; and if a man is hurt or damaged in his property, business, credit, or reputation by the malicious commencement or prosecution of a civil suit, without probable cause, the better doctrine is, that he can maintain an action on the case for such hurt or damage.

Some of the authorities presented by the counsel for defendants upon the argument support his position, notably the following: *McNamee v. Minke*, 49 Md. 133; *Mayer v. Walter*, 64

Pa. St. 233; *Wetmore v. Mellinger*, 64 Iowa, 741; 52 Am. Rep. 465; *Potts v. Imlay*, 4 N. J. L. 330; 7 Am. Dec. 603; *Bits v. Meyer*, 40 N. J. L. 252; 29 Am. Rep. 233.

The majority of text-writers also sustain the proposition of defendants' counsel, as do also the English authorities. The principle is grounded in most of these cases, and by the text-writers, upon the idea that in a malicious civil suit, where no property is seized, and the person is not molested, the recovery of his costs is a sufficient recompense to the injured party. Where a civil action is wrongfully brought, the costs which the party gets are a compensation for the wrong; but in a criminal proceeding there are no costs: *Townshend on Slander and Libel*, sec. 419; 2 Addison on Torts, sec. 863.

While it may perhaps be said that the weight of authority denies the action in such cases, the weight of reason certainly approves it. And latterly the American authorities are tending strongly and increasing rapidly in favor of the maintenance of the suit.

The matter of costs I do not consider a sufficient reason for denying remedy, as the costs, under our practice, awarded the prevailing party, are never sufficient to reimburse him for the actual cash expenses of the litigation, to say nothing of the loss of time and the inconvenience and trouble suffered. Even some of the cases cited by defendants' counsel hold, in language at least, that, without an arrest of the party or a seizure of his goods, if any special injury is sustained by him, an action might lie to recover his damages for such injury: See *Wetmore v. Mellinger*, 64 Iowa, 741, 744; 52 Am. Rep. 465; *Bits v. Meyer*, 40 N. J. L. 252; 29 Am. Rep. 233.

A large number of cases hold that it is not necessary that there should be an arrest or a seizure of property, but that the malicious prosecution of a civil suit, and especially the swearing out of a false attachment without probable cause, is actionable: *Tomlinson v. Warner*, 9 Ohio, 104; *Fortman v. Rottier*, 8 Ohio St. 548; 72 Am. Dec. 606; *Marbourg v. Smith*, 11 Kan. 554; *Whipple v. Fuller*, 11 Conn. 581; 29 Am. Dec. 330; *Closson v. Staples*, 42 Vt. 209; 1 Am. Rep. 316; *Pangburn v. Bull*, 1 Wend. 345; *McCardle v. McGinley*, 86 Ind. 538; 44 Am. Rep. 343; *Lockenour v. Sides*, 57 Ind. 360; 26 Am. Rep. 58; *Burnap v. Albert*, Taney, 244; *Cox v. Taylor's Adm'r*, 10 B. Mon. 17; *Eastin v. Bank*, 66 Cal. 123; 56 Am. Rep. 77; *Burton v. St. Paul etc. R'y Co.*, 33 Minn. 189; *Parmer v. Keith*, 16 Neb. 91; *Woods v. Finnell*, 13 Bush, 629.

The reason for the rule laid down by these last-mentioned authorities seems to me to be satisfactory, and in accordance with right and justice. The common law declares that for every injury there is a remedy. Especially is this so where the injury is malicious. If a man is injured in his credit and reputation, and his business lessened or broken up, it can make no difference, in his right to recover for such injury, that his person or property has not been manually seized or disturbed. But this is my individual opinion, the other members of the court not deeming it necessary in this case to express any opinion upon this matter.

It is also urged against the right of plaintiffs to maintain their action that the pleadings and proofs both show that the attachment suit was not determined in favor of the defendants in that cause, the plaintiffs in this suit, and that an adjustment, compromise, settlement, or payment of a claim, with full knowledge of the facts, and of the methods of procedure which have been adopted for the purpose of enforcing it or collecting it, is a bar to an action of malicious prosecution.

This objection is not tenable. When the action complained of is the beginning or prosecution of a criminal suit or proceeding, it is properly held, by all the authorities, that the determination of such suit or proceeding must be such as does not admit a reasonable cause for the prosecution. There must be an acquittal, or such proceedings as determine the case in the favor of the accused person without any settlement by him of the criminal charges, or any connivance on his part to secure his discharge. This is also the general rule where a groundless and malicious civil suit constitutes the cause of action. Were the rule otherwise, the defendant in the action complained of might recover in an action for malicious prosecution, and yet be convicted, or have a judgment rendered against him in the former suit.

But as is well said in the case of *Fortman v. Rottier*, 8 Ohio St. 550, 72 Am. Dec. 606, the reason of the rule does not apply in the case of the suing out of a false and malicious attachment. The plaintiffs "do not bring their action to recover for a malicious prosecution, strictly speaking, nor for the malicious and groundless instituting and prosecuting of a civil suit. They admit that they were indebted to Fortman [in this case Hinchman and Sons]; but they complain that, for purposes of mere oppression, he [they] wantonly, maliciously,

and without probable cause, by his own false affidavit of an *ex parte* character, procured an attachment to be issued under the statute, as auxiliary to his suit. That such a wrong will constitute a valid cause of action, would seem reasonable. . . . Now, if the affidavit was false, . . . and if Fortman had no good reason to believe it true, there would be a clear absence of probable cause. But the subsequent proceedings in the cause would not, necessarily, involve an inquiry into the truth or falsity of this part of the affidavit [alleging acts done, or about to be done, with intent to defraud creditors]; nor would the final judgment at all determine this question. The existence of the debt, which is all that the judgment ascertains, does not, of itself, constitute probable cause for the attachment. The general principle seems to be that, when the termination of the former suit can neither tend to establish nor invalidate the plaintiff's cause of action, it is not necessary to aver such termination."

Nor is it necessary that the attachment must have been discharged, or otherwise terminated in favor of the plaintiffs, in the suit for malicious prosecution. The settlement of the debt by the plaintiffs, and the payment of the costs of the proceedings, upon the principles and for the reasons above stated, cannot prevent the maintenance of this action if the attachment was malicious and without probable cause: *Fortman v. Rottier*, 8 Ohio St. 551, 552; 72 Am. Dec. 606; *Marbourg v. Smith*, 11 Kan. 554; *Bump v. Betts*, 19 Wend. 421; *Kinsey v. Wallace*, 36 Cal. 462; *Spaulding v. Wallett*, 10 La. Ann. 105; *Wall v. Toomey*, 52 Conn. 85, 88; *Morton v. Young*, 55 Me. 24; 92 Am. Dec. 565.

It is claimed that the court erred in instructing the jury that there was a sufficient service of the writ to maintain a charge of abuse of process; that there was a sufficient service of the writ to maintain the action, and support the declaration, by the officers going into the store and maintaining possession, or rather remaining there, until they were ordered away by the defendants. As previously stated, there was no error in this instruction. The act of the officers in going to the store with the writ, showing it to one of the plaintiffs, and remaining there for the purpose of preventing any goods going out of the store, must be regarded as a constructive service of the writ or taking possession of the goods.

The court also charged the jury that, as a matter of law, the attachment suit had come to a termination in favor of the

plaintiffs. Although it cannot be considered that such suit had been terminated in favor of the plaintiffs (the defendants in that suit), yet, as heretofore shown, it was not necessary that the suit should have so terminated. Under the facts of the settlement, as shown by the evidence, the plaintiffs were entitled, under the authorities, to maintain this suit; such settlement being no bar to this action. Therefore no error was committed.

The instruction of the court as to probable cause is also complained of, but we cannot discern any fault in it, at least as against the defendants. The jury was informed, in substance, that probable cause would be such cause as the generality of business men of care and prudence would act upon under like circumstances; that the fact that the plaintiffs neglected to pay the debt, or were careless in the conduct of their business, would not be sufficient to justify the belief that they were about to dispose of or conceal their property with intent to defraud their creditors; that the probable cause to believe this must have been founded on competent evidence; and that, unless they found that the defendants did have probable cause to believe that the plaintiffs intended to do what the affidavit charged, then there was no probable cause for suing out the writ; and that, if they did not find the existence of such probable cause, they must also find, in addition, that the defendants acted from malicious motives in taking out the attachment; that it was not necessary that there should have been any ill-will or a purpose on the part of the defendants to injure the plaintiffs without cause; that if the prosecution was willful, wanton, or reckless, or against the prosecutors' sense of right or duty, or for ends which they knew, or were bound to know, were wrong, this would be malice within the meaning of the law.

This was as favorable to the defendants as they had the right to expect. The want of probable cause in itself raises a presumption of malice under the law.

There is no doubt that if the defendants honestly believed that they had probable cause, the mere fact that there was not in reality any probable cause would not render them liable. But it was for the jury to determine whether they honestly believed that they had probable cause, and they could only determine this by ascertaining what careful and prudent business men would have done under like circumstances.

The jury were plainly enough notified and instructed that

they must find that defendants did not have probable cause to believe the facts stated in the affidavit; and not only this, but they were further told that they must further find malice in addition to this want of probable cause. No one but the plaintiffs had a right to complain of these instructions.

The remaining objections are to the admission of certain testimony, and the refusal to strike out the evidence as to the barrel of glue, and the Wemple transaction, and the testimony of A. H. Dey.

The evidence in relation to the notice of the attachment suit being published in the Detroit Free Press, and the circulation of that paper, was admissible. It had a tendency to show the spreading at home and abroad of the fact that an attachment had been issued against the plaintiffs, which fact of itself is necessarily fraught with injury to the business of the persons so proceeded against. The publication of this item naturally injured the good name and credit of plaintiffs as business men, which would detrimentally affect their business.

It was proper to show by Dey and others that their business reputation was good before the issuing of this attachment, and it was for the jury to say whether the Wemple matter, and the refusal to deliver the "barrel of glue" without payment before delivery, were the result of the attachment proceedings, or whether the refusal of credit was attributable to other causes.

We find no errors in the admission of testimony or in the charge of the court. The action was maintainable under the declaration, and the proof sufficiently supported the declaration. The case was fairly given to the jury, and their verdict must dispose of the cause.

The judgment is affirmed, with costs.

MALICIOUS PROSECUTION. — An action may lie for malicious prosecution, although there was no arrest of person or seizure of property: *McCardle v. McGinley*, 86 Ind. 538; 44 Am. Rep. 343; *Glosson v. Staples*, 42 Vt. 209; 1 Am. Rep. 316; *Eastin v. Bank*, 66 Cal. 123; 56 Am. Rep. 77.

ACTIONS FOR MALICIOUS ATTACHMENTS, defenses thereto, as well as evidence, pleading and practice in such cases: Extended note to *Burton v. Knapp*, 81 Am. Dec. 467-480. Want of probable cause and malice must both be apparent, to authorize a recovery of exemplary damages in attachment proceedings: *Biering v. First Nat. Bank*, 69 Tex. 599; *Coleman v. Allen*, 79 Ga. 637; 11 Am. St. Rep. 440, and note 457.

MALICIOUS PROSECUTION — MALICE AND PROBABLE CAUSE: *Lunsford v. Dietrich*, 86 Ala. 250; 11 Am. St. Rep. 37; *Boeger v. Langenberg*, 97 Mo. 390; 10 Am. St. Rep. 322, and note 327; *Paddock v. Watts*, 116 Ind. 146; 9 Am. St. Rep. 832, and note 836; *McCormick H. Mach. Co. v. Collier*, 75 Iowa, 559; *Barfield v. Turner*, 101 N. C. 357; *Ross v. Innis*, 35 Ill. 487; 85 Am. Dec. 373, and note 381.

PEOPLE v. CLEMENTS.

[83 MICHIGAN, 655.]

EXEMPTIONS—RIGHT TO RESIST SERVICE OF PROCESS.—A sheriff or other officer has no right to take from a debtor, by virtue of process against him, his property which by law is exempt from execution. In such case, the officer levies on the property at his peril, and the law will not protect him; nor is the debtor compelled to submit to such trespass without reasonable resistance. Such is the rule under the Michigan statute.

Luke S. Montague, for the respondent.

Moses Taggart, attorney-general, and *William P. Van Winkle*, for the people.

SHERWOOD, C. J. The respondent was informed against in the Livingston County circuit court for resisting the sheriff in his attempt to serve a writ of attachment.

The property attempted to be taken consisted of a pair of horses, wagon, and harness, whippletrees, and two horse-blankets. The respondent claimed them as exempt, and not liable to levy upon attachment or execution, and insisted upon his right to use so much force as was necessary to prevent the sheriff from taking the property from him, and that he used no more.

On the trial, the respondent was convicted, and afterwards sentenced to nine months' imprisonment. The prosecution was had under Howell's Statutes, section 9257, which reads as follows: "If any person shall knowingly and willfully obstruct, resist, or oppose any sheriff, coroner, township treasurer, constable, or other officer or person duly authorized, in serving or attempting to serve or execute any process, rule, or order, made or issued by lawful authority, or shall resist any officer in the execution of any ordinance, by-law, or any rule, order, or resolution made, issued, or passed by the common council of any city, board of trustees, or common council or village council of any incorporated village, or township board of any township, or shall assault, beat, or wound any sheriff, coroner, township treasurer, constable, or other officer duly authorized, while serving or attempting to serve or execute any such process, rule, or order, or for having served or attempted to serve or execute the same, or shall so obstruct, resist, oppose, assault, beat, or wound any of the aboved-named officers, or any other person or persons authorized by law to maintain and preserve the peace, in their lawful acts, attempts, and efforts to maintain, preserve, and keep the peace, every person so offending

shall, on conviction thereof, be punished by imprisonment in the state prison not more than two years, or by imprisonment in the county jail not more than one year, or by fine not exceeding five hundred dollars."

The writ of attachment, under which the sheriff attempted to make the service, ran against the defendant and his wife. Mrs. Clements was acquitted upon the trial.

No question seems to have been made but that the property belonged to the wife; that it was their only team, wagon, and harness, and that they were carrying on agricultural pursuits as their principal business when the property was seized. It nowhere appears in the record that any appraisal of the property was ever made, and the testimony all shows that it was worth less than \$250. It is true, the sheriff says he thought it was worth more than that, but it required a consultation with the plaintiff in the attachment to reach that conclusion. The fact that the property was not worth \$250 is established by a sale made of the same under an execution for \$162.

At the close of the trial the defendant's counsel made the following requests to charge:—

"1. The team, wagon, and harness, which the sheriff sought to take from defendants in this case, are exempt from levy and sale on execution, and he had no right to take them from their possession, and defendants had a right to use such reasonable force as was necessary to prevent the sheriff from taking such property from them; and having such right, they are not guilty, under the statute, of resisting the sheriff in the service of process, unless you find they use more force than was necessary for that purpose.

"2. It was the duty of the sheriff, when he went to serve the papers, to inform the defendants of the nature of the process he held against them, and ascertain whether they claimed the team as exempt; and if you find he did not do so, but immediately proceeded to take the team from their possession, in disregard of their right to hold it as exempt, they were fully justified by the law in using sufficient force to prevent his taking it."

The court refused to give these charges, but, referring to the subject, said to the jury:—

"The team, vehicle, the harness, and other things must relate to the occupation or business of the person claiming the exemption. They are exempt when, in the language of the statute, 'they enable such person to carry on the profession,

trade, occupation, or business in which he is wholly or principally engaged,' and they shall not exceed in value \$250.

"As public officers are presumed to act honestly and faithfully in the discharge of their duties, I am of the opinion, and so I charge you, that the legislature never intended that the debtor should be the judge of his own case, and enforce his own judgment by physical force upon the officer before he had made a levy, and before he had made an inventory, and before he had had time to make an appraisal, or had time to determine whether or not the debtor came within the class of persons who are entitled to an exemption of any kind. . . . The law affords a peaceful tribunal, to which men may resort to have determined all their grievances, where the question of exemption can be tried by the court and jury.

"No doubt there are cases of hardship growing out of that requirement of the law, but the law, rather than have a breach of the peace, have life threatened, limb endangered, will compel exempt persons necessarily to suffer some inconvenience by resorting to process of law, and this is the only safe tribunal in our society and under our civilization which can be relied upon."

To the refusal to give the foregoing requests, and to the giving the subsequent paragraph noted, defendant's counsel excepted.

We think the exceptions are well taken. The requests should have been given upon the undisputed testimony. There is no law in this state which permits a sheriff or other officer to take from a debtor his only team, wagon, and harness, worth less than \$250, while his business is farming and he is engaged therein, whether he has process against the debtor or not. No writ in this state authorizes the sheriff to levy upon such property, and when he does it, it is at his own peril. The law will not protect him in doing that which it has expressly commanded him not to do.

Neither is the debtor compelled to submit to such trespass without reasonable resistance. If the doctrine contended for by the prosecution, and laid down in the charge, were to obtain, every poor debtor would be at the mercy of the sheriff and constabulary of the county, and the statutory benefits intended by the exemption would be of little avail. No officer can be legally authorized to invade private rights in any such manner. It is quite enough that property liable to be seized may be taken from the debtor before trial and judgment.

The judgment at the circuit must be reversed, and the prisoner discharged.

REMEDY OF DEFENDOR WHOSE EXEMPTION RIGHTS HAVE BEEN DISREGARDED. — Right to use force, etc.: See extended note to *Van Dresser v. King*, 75 Am. Dec. 648-653; compare *Hall v. Ray*, 40 Vt. 576; 94 Am. Dec. 440, and note *White v. Stribling*, 71 Tex. 108; 10 Am. St. Rep. 732, and note.

HASKINS v. RALSTON.

[60 MICHIGAN, 62.]

MALICIOUS PROSECUTION. — Counts for malicious prosecution and false imprisonment may be joined under the Michigan practice.

MALICIOUS PROSECUTION. — A declaration for malicious prosecution alleging that defendant caused plaintiff's arrest on a warrant charging him with having committed an offense punishable by law, to wit, uttering and publishing as true a certain false, forged, and counterfeited note, for the payment of money, knowing said note to be false, forged, etc., with intent to injure and defraud, correctly describes an offense of which a justice has jurisdiction to hold an examination for commitment for trial at the circuit court.

MALICIOUS PROSECUTION. — A declaration for malicious prosecution alleging that plaintiff was not only finally discharged, but duly discharged and fully acquitted, charges, inferentially at least, that the arrest was for examination before a justice, as there could be no discharge, joined with an acquittal, except upon a hearing upon the charge.

MALICIOUS PROSECUTION. — A declaration alleging that defendant maliciously, and without reasonable or probable cause, and without investigation or inquiry to ascertain the truth thereof, caused plaintiff to be arrested and imprisoned for a certain number of days, at the expiration of which time he was duly discharged and fully acquitted, clearly charges malicious prosecution, and not illegal arrest and false imprisonment.

WARRANT OF ARREST — SUFFICIENCY OF. — A warrant charging defendant with uttering and publishing as true a certain false, forged, and counterfeited note for the payment of money on a certain date, and describing the note, defendant well knowing at the time that said note was false, forged, and counterfeited, sufficiently describes the offense of forgery without averring an intent to defraud.

FORGERY — AVERMENT — INTENT. — The term "forged," in law, indicates a fraudulent intent and purpose in making the writing.

NECESSARY AVERMENTS IN CHARGING OFFENSE. — The Michigan constitution and statutes only require that, in charging an offense, such description be used as will fully inform the person charged as to what he has to meet, and of the nature of the accusation against him.

WARRANT OF ARREST — SUFFICIENCY OF. — A warrant issued upon an original complaint on information and belief, but reciting that, upon examination under oath, it appeared to the justice that the offense had been committed, and that there was just cause to suspect the accused to be guilty thereof, is valid and legal, as the complaint presumptively shows a legal and proper ground for the issuance of the warrant.

Mitchel and McGarry, for the appellants.

A. A. Ellis and S. V. R. Trowbridge, for the plaintiff.

CAMPBELL, J. Plaintiff recovered judgment in the circuit court for the county of Ionia against defendants for \$266 damages. His grievance consisted in being arrested and confined for about thirteen days on a charge of forgery, from which he was finally discharged on the preliminary examination. A chief question presented to us is, whether the suit was for malicious prosecution or false imprisonment. A subordinate question is, whether the warrant issued by the examining magistrate to bring the plaintiff before him for examination was void. When the case went to the jury, the court below held it was a suit for false imprisonment, and held the warrant void on its face. This left nothing for the jury but to assess the damages, if defendants were responsible for its issue, as it was held there was enough to authorize the jury to so conclude.

The first count in the declaration is admitted to be for malicious prosecution, and was abandoned on the trial. As we have held that counts for false imprisonment and malicious prosecution may be joined under our practice, this left the case to proceed on the other count or counts; for the plaintiff claims there were three counts, and not two: *Long v. Judge of Wayne Circuit Court*, 27 Mich. 164.

The only count on which plaintiff relies is what he calls the "second count." If there is a third count, it does not allege a false imprisonment beyond what was set up in the second count. If it is really an appendage to the second count, it merely sets up matters in aggravation.

The second count, in effect, charges the defendants maliciously and falsely, without probable cause, and without making investigation into the truth of the matter, and without informing the prosecuting attorney, "charged the said plaintiff with having committed a certain offense punishable by law, to wit, uttering and publishing as true a certain false, forged, and counterfeited promissory note for the payment of money, knowing said promissory note for the payment of money to be false, forged, and counterfeited, with the intent to defraud and injure as aforesaid"; and that defendants, on the 21st of November, maliciously, and without reasonable or probable cause, and without investigation or inquiry to ascertain the truth thereof, caused plaintiff to be arrested and imprisoned

for thirteen days, at the expiration of which time he "was duly discharged, and fully acquitted of the said supposed last-mentioned offense," etc.

The charge set forth in this count is not only substantially, but technically, correct, in describing an offense for which a justice had jurisdiction to hold an examination for commitment for trial at the circuit. The count charges, inferentially at least, that the arrest was for examination before a justice, because it proceeds to state that plaintiff was not only discharged finally, but "duly discharged, and fully acquitted." There could be no discharge, joined with an acquittal, except upon a hearing upon the charge. It is not alleged in this count that there was an arrest on a bad warrant, or without a warrant, or that the warrant was issued irregularly. This is very clearly a charge of malicious prosecution, and not a charge of illegal arrest and false imprisonment.

But the case would not be improved if the action had been for false imprisonment. On the trial, a warrant was produced which appears to have been issued after a preliminary examination of defendants, and which sets out the acts plaintiff was charged to have done. The offense is charged in these words, after an introduction which will be referred to hereafter: "That heretofore, to wit, on the twenty-eighth day of October, A. D. 1882, at the township of Sebewa, in the county aforesaid, one Lewis Haskins did utter and publish as true a certain false, forged, and counterfeited promissory note for the payment of money, which said false, forged, and counterfeited promissory note for the payment of money was dated Sebewa, Michigan, October 28, 1882, for the sum of thirty-five dollars, with interest, and made due and payable thirty days after date, and signed with the name 'Oliver Benschoter'; he, the said Lewis Haskins, at the time he so uttered and published the said false, forged, and counterfeited note for the payment of money as aforesaid, well knowing the same to be false, forged, and counterfeited; against the form," etc.

It is claimed in this court that this warrant is bad, because it does not aver the uttering and publishing to have been with intent to defraud, which is the statutory addition to the other elements of crime charged.

It would be sufficient to say, in this matter, that the court below did not decide the warrant bad on any such ground.

And furthermore, it is not charged in the declaration that the warrant was bad for this reason, or for any other reason

shown on its face. On the contrary, the declaration sets forth that the arrest was for a charge containing all the elements of a statutory crime, including the fraudulent intent. Both of these reasons are fatal to any attack on the warrant in this court on any such ground.

But we think the warrant, so far as the description of the offense is concerned, is sufficient. It sets out the overt acts which make up the crime completely, and a guilty knowledge of the forged character of the paper. The term "forged," in law, indicates a fraudulent purpose in making the paper; and proof of the facts and knowledge set up in this document would allow, although it might not under some circumstances compel, an inference of guilt. Such a description would fully inform the person charged as to what he was to meet, and of the "nature of the accusation against him," which is the only constitutional requirement on the subject. The constitution does not require technical accuracy, and the statute does not require it. By section 9456 of Howell's Statutes it is provided that the preliminary warrant shall recite "the substance of the accusation." This does not seem to indicate the necessity of anything more, and there has never been any intimation by this court that any more was required.

In *Beecher v. Anderson*, 45 Mich. 543, and in *Wheaton v. Beecher*, 49 Id. 348, the same warrant of arrest came before us in two different forms. In the first case the defendant, who was sheriff of Marquette County, had arrested Mr. Wheaton on the warrant, which purported to be for perjury, and which, instead of containing any mere definition, set out at length the facts themselves on which the charge was based. The arrest being made in winter at Detroit, and there being some practical difficulty in taking the prisoner to Marquette without passing through other states, the sheriff, on the order of the prosecuting attorney, let Mr. Wheaton go free from the arrest. A subsequent application was made to this court to compel the sheriff to rearrest Mr. Wheaton, and take him before the magistrate for examination, the difficulty of travel having ceased by the opening of the season of navigation. The sheriff returned that he had acted under the direction of the prosecuting attorney; but Mr. Wheaton attacked the writ as invalid. It was held that technical questions should not be regarded; but as there was no allegation of fact which showed that the oath taken was one which, under the practice, was of any materiality, this court refused to compel fur-

ther action under a complaint which might amount to nothing in any shape, and which, if set aside, would not stand in the way of a more perfect new one. In the last case, which was an action for false imprisonment, it was held there was no such defect in the warrant as would render the service of it a false imprisonment.

In *Pardoe v. Smith*, 27 Mich. 83, a warrant which left out several statutory elements was held substantially good, as leading to an inference of what the statute required to be made out; and it was held that the defects were mere irregularities, and not jurisdictional. The cases of *Turner v. People*, 33 Id. 363, and *Yaner v. People*, 34 Id. 286, are in the same direction. Attention is drawn in both these cases to the difficulty of reaching precision before the facts are fully brought out on the examination, and it is shown very fully that no more than substantial statements can be required. Similar doctrine is found in *People v. Rutan*, 3 Id. 42, and *Daniels v. People*, 6 Id. 381, as to the description of offenses in criminal recognizances to answer to indictments or informations which might be found at the circuit. In the former case the recognizance was after indictment, and merely set out that Rutan had been charged with setting fire to and willfully burning a building known as the Canal Mills, belonging to persons named. It was held this was no such description of an offense as would be sufficient in an indictment, and that, standing alone, it made out directly no offense at all. But it was held sufficient to sustain the recognizance; and the court said that the offense need not be stated as in an indictment, and need only be described with such certainty as to show that it was within the jurisdiction of the officer to take bail. In the case of *Daniels*, he waived examination, and gave bail to answer "for the crime of incest." This was all that was said at all concerning the charge. It was there held, also, that an indictment charging that crime by name was not within any statute, but that the statutory crime would be as well understood in the popular sense by the name of "incest" as by the statutory language, and that a description according to the common understanding was enough.

It must be remembered that criminal complaints must often be made by persons of limited education, before justices who are not lawyers, and who are not at all acquainted with legal niceties. To require them to do more than describe offenses with substantial correctness, or to give in the warrant any

more information than is needed to inform the defendant of the crime he is charged with, and that it is a crime, would be to make it practically impossible to hold shrewd criminals at all, in many places, and we think it would be of no use to any one. The criminal law text-books do not, so far as we have examined them, require any particular formality in warrants of arrest, but they are treated of as varying according to the practice of different places.

The court below held the warrant void for the supposed reason that it was issued purely on information and belief, and so showed on its face. This is not correctly stated. The original complaint before the justice was on information and belief, according to the warrant; but it goes on to recite that, upon an examination on oath of the present defendants before him, it appeared to the justice that the offense had been committed, and that there was just cause to suspect plaintiff to be guilty thereof. This must be presumed to have been a legally proper showing. In our opinion, the warrant was on its face valid, and an arrest under it was a lawful arrest. The only cause of action that could exist in such a case was one for malicious prosecution.

It was error to hold otherwise, and the judgment must be reversed, and a new trial granted.

We need not consider the other questions, as the case was tried on a wrong theory of the issues.

MALICIOUS PROSECUTION — FALSE IMPRISONMENT. — Where in an action malicious prosecution is alleged in one count, and false imprisonment in another, both based upon a search-warrant containing a clause of arrest, recovery on one count is a bar to judgment on the other: *Boeger v. Langenberg*, 97 Mo. 390; 10 Am. St. Rep. 322; compare extended note to *Ben v. State*, 58 Am. Dec. 229 et seq.

MALICIOUS PROSECUTION — PLEADING. — The petition in an action for wrongful prosecution is fatally defective, unless it states that the prosecution was malicious, and that plaintiff was acquitted: *Mooney v. Kennett*, 19 Mo. 551; 61 Am. Dec. 576; *Griffin v. Chubb*, 7 Tex. 603; 58 Am. Dec. 85; *Turner v. Walker*, 3 Gill & J. 377; 22 Am. Dec. 329.

FORGERY, SUFFICIENCY OF AN INDICTMENT FOR: *Hendricks v. State*, 26 Tex. App. 176; 8 Am. St. Rep. 463, and cases collected in note 470; *State v. Cross*, 101 N. C. 770; 9 Am. St. Rep. 53, and note 68, 69; *King v. State*, 27 Tex. App. 567; 11 Am. St. Rep. 203. An indictment for uttering a forged writing must state the acts which constitute the uttering, not the forging, of the instrument: *Lockard v. Commonwealth*, 87 Ky. 201. In indictments for forgery, it is only necessary to aver matters *alibunde*, when such matters are essential to constitute the crime of forging an instrument, which is invalid upon its face: *People v. Todd*, 77 Cal. 464; *State v. Wingard*, 40 La. Ann. 733.

DRAKE v. LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY.

[69 MICHIGAN, 162.]

GARNISHMENT — EVIDENCE. — After service of summons to show cause, a garnishee defendant may make further and supplemental disclosure, and give in evidence matters of hearsay touching his liability to the principal defendant.

GARNISHMENT IN ONE STATE OF DEBT EXEMPT IN ANOTHER. — Garnishment proceedings cannot be instituted in one state to evade the exemption laws of a sister state, and thus deprive a laborer of the benefit of the laws of the latter state to protect his wages from seizure, when he resides in that state, has not been personally in the state where suit is instituted, and has no property in that jurisdiction.

GARNISHMENT IN ONE STATE OF DEBTS EXEMPT IN ANOTHER. — A creditor who is a citizen of one state cannot, by assigning his claim to a citizen of another state, use the courts of that state to collect a debt against a citizen of the former state whose person or property is not within the jurisdiction where suit is brought, and whose wages, sought to be reached and confiscated by garnishment, are exempt from seizure by the law of his state.

GARNISHMENT IN ONE STATE OF DEBT EXEMPT IN ANOTHER. — The wages of an employee, exempt from attachment by the law of the state of his residence, where his contract for services is made and performed, and where his wages are payable, and the debt contracted, are not subject to garnishment in another state, where he has not subjected himself to the jurisdiction of the court save by the disclosure of the garnishee.

Orris P. Coffinberry, for the appellant.

Weaver and Weaver, George C. Green, and O. G. Getsen-Danner, for the garnishee defendant.

MORSE, J. The plaintiff commenced proceedings in justice's court by garnishee in attachment for the sum of \$7.16, claimed to be due him from one S. J. Coder, an employee of the defendant railroad company.

No personal service of the attachment writ was had upon the principal defendant, and no goods or chattels were seized by virtue of it. There was no appearance by or for the defendant in the principal suit.

The attachment was procured upon affidavit that the principal defendant was not a resident of this state.

A copy of the attachment was left with the agent of the railroad company at Constantine, Michigan, on the thirtieth day of September, 1886, the return day being October 6, 1886; and the officer returned that he could not find the principal defendant in the county of St. Joseph, where the action was commenced.

The garnishee summons was served September 27, 1886. On the return day the plaintiff appeared; the defendant did not appear. The cause was thereupon adjourned to November 13, 1886. On the last-named day defendant did not appear. Plaintiff introduced the disclosure of the railroad company to show jurisdiction. Witnesses were sworn, and judgment rendered against the principal defendant for \$7.16 damages, and \$7.39 costs of suit.

December 9, 1886, a second summons was issued against the garnishee defendant to show cause why judgment should not be rendered against it, returnable December 17, 1886.

On the return day of this second summons plaintiff declared against the railroad company.

The disclosure of the company, made by J. M. Davis, its agent at Constantine, under oath, on the thirtieth day of October, 1886, simply showed that at the date of the service of the first summons the company was indebted to S. J. Coder, the principal defendant, in the sum of \$109.20. Before pleading, the railroad company asked the privilege of making further answer, explanatory of and supplemental to the disclosure already made. The record does not disclose whether such request was granted.

The defendant then pleaded the general issue, with notice of the matters offered as explanatory of and supplemental to the disclosure, in defense of the action. The main averments of this notice will appear when the findings of the circuit judge are noticed.

Upon the trial in justice's court, judgment was rendered against the garnishee defendant for the sum of \$14.55 damages, and \$5.28 costs of suit.

The cause was appealed to the circuit, in which court the same was tried, without a jury, and judgment entered upon findings of fact and conclusions of law in favor of the defendant. The plaintiff brings error.

In the circuit court the garnishee defendant, against the objection of the plaintiff, was permitted to make further answer.

The circuit judge found the following facts:—

1. That there was no personal service of the attachment upon the principal defendant, and no goods seized by virtue of the writ, and no appearance by such defendant.

2. That such defendant was from the beginning to the end of the proceedings a resident of the state of Indiana; that he

was employed by the garnishee defendant in that state, and his services for which the garnishee was indented were rendered in Indiana.

3. That the contract for such services was made in Indiana, and the wages of said principal defendant were due and payable in that state; and that the amount owing to him from the garnishee was for one month's labor, under a contract made and payable in Indiana; and that at the time of the service of the garnishee process he was still under employment of the garnishee in that state, under such contract, and was a citizen of Indiana.

4. That the statute of Indiana provides that the wages of all persons in the employ of any person or corporation shall be exempt from garnishment, and proceedings supplemental to execution, in the hands of such person or corporation, so long as such employee remains in such employment, not exceeding one month's wages at any one time.

5. That the claim of plaintiff against the principal defendant, upon which the justice's judgment was rendered, was assigned by a citizen of Indiana to plaintiff; that the same was a debt, if any there was, contracted by said principal defendant in the state of Indiana, he then being a citizen of that state; and that such debt was assigned to plaintiff for the purpose of instituting these garnishee proceedings for the collection thereof.

The circuit judge found the law upon these facts as follows:—

"1. The indebtedness disclosed by the garnishee was not within the jurisdiction of the justice, and was not subject to, and could not be reached by, the process of said court, either in attachment or garnishee process.

"2. The indebtedness or credit sought to be reached by these proceedings was not liable to process of garnishment.

"3. Said indebtedness having arisen under a contract made payable in another state, viz., Indiana, and being absolutely exempt from garnishment by the statute of that state, the same was not liable, and could not be liable, to garnishee process in these proceedings.

"4. The garnishee defendant is entitled to have judgment rendered in his favor."

The plaintiff excepted to several of the findings of facts; but we find in the record, testimony, if the same was not improperly admitted, tending to establish all the findings. The weight of the evidence was for the trial court. We cannot disturb any

of his findings, unless there is shown by the record an absolute want of any testimony to support them.

The garnishee defendant also had the right to make further and supplemental disclosure, and to give in evidence matters of hearsay, even, touching its liability to the principal defendant: *Sexton v. Amos*, 39 Mich. 695; *Newell v. Blair*, 7 Id. 103; *Maynards v. Cornwell*, 3 Id. 313. The garnishee had the right, and it was its duty, to state in the answer every fact within its knowledge which had any legitimate tendency to show that it ought not to be charged: *Drake on Attachment*, sec. 630. Therefore, the objections to the reception of the testimony upon which the findings of the circuit judge were based are not tenable, unless it be that such testimony was immaterial and irrelevant, as having no tendency to defeat the plaintiff's action.

Therefore, the material inquiry arises, and must be disposed of, whether or not the fact of the principal defendant being all the time a resident of the state of Indiana, the contract for services being made, and the wages therefor payable, in that state, and that such services were rendered there, and also that such wages, so garnished, were exempt under the statutes of that state, have any effect upon the right of the plaintiff to recover from the garnishee.

The counsel for the plaintiff claims that the exemption laws of another state cannot be pleaded or relied upon as a defense to the garnishment in this case, either by the judgment debtor or the garnishee defendant; and that the court erred, not only in admitting this evidence, but in concluding, as a matter of law, that the indebtedness from the garnishee defendant to the principal debtor was not within the jurisdiction of the justice, and not subject to the process of the court, and in the other conclusions of law as well.

Upon the other hand, the counsel for the garnishee defendant contend that, under the circumstances disclosed by the finding of facts, this indebtedness had its *situs* in the state of Indiana, a foreign jurisdiction, and could not be subjected to the process of the justice in this case by either the attachment or garnishee process; that the justice obtained no jurisdiction, by personal service or otherwise, over the principal debtor, who was a citizen of Indiana; neither did he acquire any jurisdiction over any property belonging to such debtor by seizure thereof; and he could not gain jurisdiction over this debt so

intent to acquire jurisdiction in Iowa to defeat the rights of citizens of Nebraska.

In *Mooney v. Union Pacific R. R. Co.*, 60 Iowa, 346, it is squarely held, in a case very much like the present, that the rule that the *situs* of a debt, considered as property, is determined by the residence of the creditor, cannot be applied in that state in attachment proceedings against non-residents. In that case, the plaintiff and defendant in the principal suit were both residents of Nebraska, by the law of which state the debt sought to be garnished, which was for wages, was exempt. The services for which the railroad company was garnished were contracted for and performed in Nebraska, where the company had its general offices, and where it was accustomed to pay its employees; but there was no express contract that it should be paid there. The company was operating a part of its road in Iowa. An original notice was served upon the principal debtor in Nebraska, which was held to be equal to service by publication, and to give the court in Iowa jurisdiction under the laws of that state. The court held that the action could be maintained, and the debt appropriated. This ruling was afterwards affirmed in the case of *Broadstreet v. Clark*, 65 Id. 670, the court holding as follows: "We regard it as the settled rule in this state that the exemption laws of another state or territory cannot be pleaded or relied on as a defense by either the garnishee or judgment debtor"; citing the cases heretofore noted as the authority for such rule, and also *Burlington etc. R. R. Co. v. Thompson*, 31 Kan. 180; 47 Am. Rep. 497. The decision in the latter case seems to be based upon the Iowa cases; citing also, in support of the opinion, the following additional cases: *Conley v. Chilcote*, 25 Ohio St. 320; *Baltimore etc. R. R. Co. v. May*, 25 Id. 347; *Pierce v. Chicago etc. R'y Co.*, 36 Wis. 288; *Morgan v. Neville*, 74 Pa. St. 52; *Lock v. Johnson*, 36 Me. 464; *Chicago etc. R. R. Co. v. Ragland*, 84 Ill. 375.

The first Ohio case cited has no bearing upon the question; and it appears in the second case in the same state that the justice of the peace, before whom the garnishee proceedings were pending in West Virginia, had full jurisdiction by the laws of that state over both the subject-matter of the suit and the parties thereto. It was thereupon held by the supreme court of Ohio, that, notwithstanding the fact that the plaintiff in the Ohio suit (defendant in the West Virginia proceedings), and his creditors, who had garnished the railroad company in

West Virginia, were citizens of Ohio, the garnishee proceedings in West Virginia were valid, and a bar to the suit of the plaintiff for the same debt against the railroad company in Ohio. It seems that the plaintiff had been sued in West Virginia by his creditors, and the railroad company garnished in that proceeding in that state. There is nothing in the report of the case to show but that personal service was obtained upon the plaintiff, the defendant in West Virginia, in that state.

The cases in 84 Illinois and 36 Maine do not touch the question at all.

The 36 Wisconsin case holds a contrary doctrine to the one it is cited to support, and by analogy is opposed to the validity of the proceedings in the case now being discussed. It was there held that a garnishee judgment obtained in Illinois against a corporation created, and operating its road, both in Illinois and Wisconsin, on account of the wages due a resident of the latter state, and exempt under its laws, where the proceedings to obtain such judgment were *ex parte*, and without any notice to the persons to whom the wages were due, could not be pleaded in bar of his action in Wisconsin against the corporation for such wages: See also *Commercial Nat. Bank v. Chicago etc. R'y Co.*, 45 Wis. 172. *Morgan v. Neville*, 74 Pa. St. 52, seems to sustain the contention of the plaintiff.

In the present case, the court below finds that the plaintiff bought the claim in suit for the express purpose of assisting the original creditor of the principal debtor in evading the exemption laws of a sister state, — a proceeding which the rule of comity existing between the states should not, and will not, permit. The circuit judge was therefore right in entering judgment for the garnishee defendant.

But I am also satisfied further that where this purpose of evasion is not shown, in a case where the employee, whose wages are exempt in Indiana, does no act whereby he subjects himself to the jurisdiction of the courts in Michigan, and where the contract for the services is made and payable in Indiana, and the services performed there, and no jurisdiction of the person or property of the employee is obtained here, save by the disclosure of the garnishee, and the debt of the employee to the plaintiff was also contracted in Indiana, the proceedings in attachment and garnishment cannot be successfully maintained here, as in the present case, upon legal principles.

Granted, as claimed by some of the authorities above noted, that the matter of exemption, being one affecting the remedy, is controlled by the *lex fori*, and not by the *lex loci contractus*, yet when one entitled to such exemption keeps his person and his property within the locality of the contract, and does not enter, and is not brought, except by substituted service, within this state, he cannot, in reason and justice, be deprived of the exemption secured to him by the law of his domicile. He is entitled to his day in court, and to defend his rights, both as against his creditor and his debtor, in the state, and under its laws, where both the debts were contracted in the face and under the knowledge of such laws.

If he came into Michigan and contracted his debt, or if he contracted it to a citizen of Michigan while in Indiana, the case might be different. But here the wages of Coder had been set apart by the laws of Indiana as a trust fund in the hands of his employer, the garnishee defendant, for the use and benefit of his family, and creditors were barred from appropriating it to their claims without his consent. This the assignor of the plaintiff knew when he gave him the credit, and that garnishment proceedings in Indiana could not divert it from the purposes for which it was set apart. And the garnishee defendant became indebted to Coder with the same knowledge. No jurisdiction could be obtained, under such circumstances, over the principal defendant, without personal service or an attachment of property.

It would be a most singular administration of justice that would permit the justice's court to base its jurisdiction to render judgment against the principal defendant, solely upon the disclosure of the garnishee defendant under these circumstances, and then allow the same court, or any other, to base a judgment against the garnishee defendant for this trust fund upon this judgment so obtained against the principal defendant. It would give a debtor a splendid opportunity, by collusion, to rob his creditor of the benefit of this trust fund in all cases, and without his knowledge, by simply slipping over the line into Michigan, that garnishee process might be served upon him therein.

It must be held, I think, not only as a matter of simple justice, but as sound law, which means justice, that where the creditor, debtor, and garnishee, at the time of the creation of both debts, are all residents and doing business in Indiana, and both debts are created, and intended to be payable, in

that state, the exemption of wages is such an incident and condition of the debt from the employer that it will follow the debt, if the debt follows the person of the garnishee into Michigan, and attach itself to every process of collection in this state, unless jurisdiction is obtained over the person of the principal debtor; that it becomes a vested right *in rem*, which follows the debt into any jurisdiction where the debt may be considered as going.

In support of this proposition, see the following cases, and authorities cited therein: *Wright v. Chicago etc. R. R. Co.*, 19 Neb. 175; 56 Am. Rep. 747; *Turner v. Sioux etc. R. R. Co.*, 19 Neb. 241; *De Witt v. Machine Co.*, 17 Id. 533; *Louisville etc. R. R. Co. v. Dooley*, 78 Ala. 524; *Pierce v. Chicago etc. R'y Co.*, 36 Wis. 283; *Baylies v. Houghton*, 15 Vt. 626; *Tingley v. Bateman*, 10 Mass. 343; *Sawyer v. Thompson*, 24 N. H. 510; *Railway Co. v. Maltby*, 34 Kan. 125; *Lovejoy v. Albee*, 38 Me. 414; 54 Am. Dec. 630; *Hamilton v. Rogers*, 67 Mich. 135.

It is not necessary to consider the other objections made to the proceedings in this case.

The judgment below is affirmed, with costs.

GARNISHMENT. — A foreign corporation doing business in this state may be garnished for a debt due to a non-resident employee, contracted outside the state, and exempt from garnishment in the state where defendant and garnishee reside: *Burlington etc. R. R. Co. v. Thompson*, 31 Kan. 180; 47 Am. Rep. 497; compare *McCann v. Randall*, 147 Mass. 81; 9 Am. St. Rep. 666, and note 674, 675; *Bowen v. Pope*, 125 Ill. 28; 8 Am. St. Rep. 330, and cases collected in note 332.

WALKER v. CONANT.

[69 MICHIGAN, 321.]

MORTGAGES — RELEASE OF FORGED MORTGAGE — CLAIM FOR REIMBURSEMENT. — Where a loan is secured on a forged mortgage, and afterwards, by a second forgery, another loan is secured on the same property, whereupon, by direction of the mortgagor, the second mortgagee pays the first mortgagee the amount due on the first mortgage, which is surrendered and canceled, the second mortgagee cannot recover the money paid upon discovering the true facts, though both mortgagees were innocent of the forgeries.

PAYMENT. — MONEY RECEIVED IN GOOD FAITH, and in the ordinary course of business, for valuable consideration, cannot be recovered because it was fraudulently obtained of some other person by the payor.

O. A. Critchett, for the appellant.

George M. Landon and Ira R. Grosvenor, for the defendant.

MORSE, J. This cause was before this court upon the pleadings in the January term, 1887, and we then overruled the demurrer to the special count of the declaration, and held that there were facts enough stated in such count to permit a recovery if no defense were made. It was there stated (see opinion 65 Mich. 197), that, as a general rule, money paid under a mistake of material facts may be recovered back, although there was negligence upon the part of the person making the payment, but that the rule was subject to the qualification that the payment cannot be recalled when the situation of the party receiving the money has been changed in consequence of the payment, and it would be inequitable to allow a recovery. The person making the payment must in such case bear the loss occasioned by his own negligence.

The case has been since tried in the court below, and a verdict directed for the defendant.

In this court there is no controversy about the facts, and the only question to be determined is, What should have been the judgment in the court below upon such facts?

Briefly, the case is this: On or about the twentieth day of December, 1883, one Edgar Van Riper obtained from the defendant, Maria S. Conant, a loan of one thousand dollars. The negotiations for the loan were made with one James Armitage, who was acting as the agent of Mrs. Conant. The loan was secured by a note and mortgage, payable in five years, purporting to be executed by Henry Van Riper (the father of Edgar), the mortgage also being signed by his wife, apparently. It was upon 160 acres of land, of the value of at least eight thousand dollars, owned by Henry Van Riper, and situated near Flat Rock, in the county of Wayne, in this state. This note and mortgage were forged, and were never executed by the elder Van Riper, or his wife, nor by any person to their knowledge, or by their consent or authority. Armitage and Mrs. Conant both supposed the securities to be genuine.

While this mortgage was upon the record in the register's office of Wayne County, and in January, 1885, this same Edgar Van Riper applied to the firm of Walker and Walker, attorneys at Detroit, for a loan for his father, Henry Van Riper, of three thousand dollars, and offered security by mortgage upon the same premises covered by the Conant mortgage, which was then unpaid.

E. C. Walker, of Walker and Walker, and a brother of the plaintiff, conducted all the negotiations with Edgar Van Riper.

He never saw him before, and has never seen Henry Van Riper or his wife, or had any negotiations with either of them. He consented to loan the money if the proper abstracts of title were furnished, and a first mortgage given upon the land. Edgar stated to Walker that James Armitage, of Monroe, held a mortgage for one thousand dollars upon the premises, which Armitage would release upon payment, and that he wished such mortgage to be paid out of the three thousand dollars to be borrowed of Walker. Walker then wrote to Armitage as follows:—

“DETROIT, January 21, 1885.

“JAMES ARMITAGE, ESQ., Monroe, Mich.

“*Dear Sir*,—I have agreed to loan Mr. Van Riper, of Flat Rock, some money on his 160-acre farm. He says you have a mortgage of a thousand dollars on it, which you will let him pay. If you will trust me with all the papers, abstract, etc., and a discharge of the mortgage, I will remit the amount due you in a draft on Detroit or New York, as you prefer.

“Very truly yours,

“E. C. WALKER.

“P. S. What do you think the farm worth?

“E. C. W.”

Edgar Van Riper also wrote at the same time the following letter:—

“DETROIT, January 21, 1885.

“J. ARMITAGE.

“*Dear Sir*,—I am here to-day, and can get the money for father of E. C. Walker, of Walker and Walker, 18 Moffat Building. He says he is acquainted with you, and says he thinks you will be willing to send all your papers and discharge to him, and he can deposit the money for you or send it to you. Will you please to send amount of all interest and charges and the trouble, and so I can pay it at the same time, and oblige? If this is not satisfactory, please write me as soon as possible, at home, and oblige.

“ED. VAN RIPER, Flat Rock, Michigan.”

Armitage replied to Walker as follows:—

“MONROE, MICH., January 22, 1885.

“Note, December 20, 1883.....	\$1,000 00
Interest.....	83 20
Charges.....	5 00

\$1,088 20

"MESSRS. WALKER AND WALKER, 18 Moffat Building, Detroit, Mich.

"*Gentlemen*,—Inclosed please find note and mortgage of Henry H. Van Riper and Lydia A. Van Riper for (\$1,000) one thousand dollars, dated December 20, 1883, to Maria S. Conant; also release of same upon his paying you for me one thousand and eighty-eight and 20-100 dollars (\$1,088.20), which you will please deposit in the Detroit National Bank, Detroit, Michigan, for my acc. Your kind letter of the 21st is duly at hand, saying that if I will intrust all papers to you, you will see that all is made right, and deposit the money in Detroit National Bank, Detroit. I inclose you the papers in full. I am not acquainted with this farm, but it is said to be valuable. Ed. Van Riper says it is worth (\$10,000) ten thousand dollars; so I understood him.

"Yours very respectfully,

"JAMES ARMITAGE,

Monroe, Michigan."

It is admitted that Armitage was still the agent of Mrs. Conant, and authorized to act for her.

Upon receiving this letter from Armitage, and the papers therein contained, Walker drew a bond and mortgage for three thousand dollars from Henry Van Riper and wife to one Helen M. Dudley, and gave them to Edgar Van Riper to have them executed, who brought them back, apparently signed by Henry Van Riper and wife, and purporting to be properly witnessed and acknowledged by John L. Near, a notary public, residing at Flat Rock, and personally well known to Walker.

The title of Henry Van Riper being clear to the premises, Walker accepted the bond and mortgage. He drew the check of Walker and Walker for \$1,088 and some cents,—the amount then apparently due upon the Conant mortgage,—and deposited the same to the credit of Armitage in the Detroit National Bank. He paid the balance of the three thousand dollars, less his commission, to Edgar Van Riper in money at his office. Edgar told E. C. Walker to pay the mortgage to Conant out of the three thousand dollars, and it was understood it should be paid in the manner it was paid.

Walker then wrote Armitage as follows:—

"DETROIT, January 26, 1885

"JAMES ARMITAGE, Esq., Monroe, Mich.

"Dear Sir,—I this day deposit to your credit, at the Detroit National Bank, \$1,088.20, as per yours of the twenty-second inst.

Very truly yours,

"E. C. WALKER."

To which Armitage replied:—

"MONROE, MICH., January 27, 1885.

"E. C. WALKER, Esq., 18 Moffatt Block, Detroit, Mich.

"Dear Sir,—Yours of the twenty-sixth is at hand, saying you had deposited in the Detroit National Bank \$1,088.20, from H. H. Van Riper, for my account. With thanks,

"Very respectfully,

"JAMES ARMITAGE."

The land covered by these two mortgages is situated some fifteen or twenty miles from Detroit. The bond and mortgage taken in the name of Helen M. Dudley was, immediately after its execution, assigned to the plaintiff by E. C. Walker, he being authorized by power of attorney to execute it. The money loaned by Walker and Walker, and secured by this mortgage, belonged to the plaintiff, and E. C. Walker was acting as his agent in making the loan. E. C. Walker consulted the plaintiff before concluding the loan, and the plaintiff consented to it. At the time the bond and mortgage were offered to E. C. Walker, he took no steps to ascertain whether they were genuine or not, taking it for granted that they were all right; nor did he inquire into the authority of the son to act for his father, but acted upon the presumption that he had such authority.

The bond and mortgage proved to be a forgery; but the plaintiff did not ascertain that fact until in the spring and summer of 1886, when he wrote to Henry Van Riper for payment of interest.

Upon the receipt of this demand for interest from plaintiff, and upon an examination of the records consequent thereon, Henry Van Riper first became acquainted with the fact of the execution of this mortgage, and the prior execution and discharge of the Conant mortgage. The mortgage and note to Mrs. Conant are probably lost or destroyed, as Edgar Van Riper testified he did not have them, and did not remember taking them from E. C. Walker. Walker did not have them at the time of the trial, and was pretty certain he delivered

them to Edgar. The truth is, no doubt, that he handed them over to Edgar, and he destroyed them, as they were evidences of his crime.

It appears, and is conceded upon both sides, that the plaintiff and defendant are equally innocent in this transaction.

Both mortgages were taken by agents, who were negligent in ascertaining the genuineness of their securities, and the authority of Edgar to act for his father, and in his behalf, in making the loans. So far the parties seem to stand upon an equal footing. Both were duped by the younger Van Riper because of a want of sufficient caution upon the part of their agents. One of them must necessarily suffer.

But by no act of Mrs. Conant has the plaintiff been put in any worse condition than he would have been had she not been concerned in the transaction; while by the act of the plaintiff's agent in delivering her note and mortgage to Edgar, she has been damnified to some extent,—how much cannot be told,—if she has to lose the money paid to her.

I think the money paid to Mrs. Conant, and represented by her note and mortgage, was in reality paid to her or her agent by Edgar Van Riper,—the man who borrowed or obtained it from her, and who honestly owed it to her,—and not by the plaintiff or his agent. The depositing of the check in the bank by E. C. Walker was a payment made at the request of Van Riper, and by his direction. It is true it was so placed at the direction of Mrs. Conant's agent, as the manner of payment; but the payment itself was directed by Van Riper, who told E. C. Walker, when he negotiated the loan, that he wanted to pay the Conant mortgage, and one of the objects of making the Walker loan was to obtain funds to pay the debt to Mrs. Conant, as is shown by Van Riper's letter to Armitage, and the method of such proposed payment is also stated in that letter.

Stripped of all sophistry, the naked case is this: Van Riper obtains three thousand dollars of the plaintiff upon a forged mortgage, and, out of the money so obtained, pays Mrs. Conant the debt he owes her, which is evidenced by a forged note, and secured by a forged mortgage upon the same premises described in the mortgage to plaintiff. The money is honestly her due, and she has an equitable right to demand and receive it of Edgar; and, believing her securities to be genuine and valid, she takes the money, and surrenders them up to him to be canceled and destroyed, and in utter igno-

rance of the fraud perpetrated upon the plaintiff by Van Riper.

It is the same in fact and in legal effect, in my opinion, as if the three thousand dollars had been paid direct to Van Riper by Walker, and he had taken the money away, and out of it afterwards paid the debt to Mrs. Conant, and received the note and mortgage direct from her hands.

In such case, it seems to me, under all the authorities, that the fact that the plaintiff or his agent supposed his bond and mortgage to be genuine, and the Conant mortgage to be a valid lien upon the premises, cuts no figure in the case. It is not a case where he has purchased the Conant mortgage as an investment, believing it to be valid. It is not a case where he has parted with his money, and received a void security, which he would not have bought had he known it to be false and forged. But in the present case he was loaning the three thousand dollars upon an eight-thousand-dollar farm, and, as he supposed, upon good security. This was the main and absorbing transaction. The payment and discharge of the Conant mortgage was but an incident of his dealing. If the mortgage had not been in existence, Van Riper would have obtained the same sum, three thousand dollars, upon the bond and mortgage delivered to E. C. Walker. Being in existence, and preventing, until discharged, a first mortgage upon the premises, Walker stipulated that this mortgage should be released out of the funds paid by him to Van Riper upon the loan. Walker would have been equally satisfied, no doubt, if Van Riper had paid the Conant mortgage before receiving any money upon the mortgage executed to Helen M. Dudley, and assigned to plaintiff; or if he had taken the money after it was paid to him and procured the release of Mrs. Conant. The plaintiff was not buying or paying off the Conant mortgage; he was loaning three thousand dollars to Van Riper's father, as he supposed, upon good security.

But Mrs. Conant would not have parted with her securities without the payment of the debt, and if this money can be recovered back from her by the plaintiff, her situation is changed, and, without her fault, beyond all possible return or restoration.

Her note and mortgage have been destroyed by the joint action of Van Riper and the plaintiff's agent, and cannot be returned to her. She has, therefore, lost the power that the possession of these papers might have given her in the collec-

tion of her debt; and it is, therefore, most inequitable to hold that she shall not only lose her debt, but also the evidences of it (false though they may be as against the elder Van Riper), for the benefit of the plaintiff, who has been equally negligent with her in making these loans, and through whose negligence, and with no fault of hers, she has lost her note and mortgage beyond recall, which note and mortgage she would not have surrendered except upon the payment of her debt.

A reference to the opinion filed when the case was here before, and the authorities there cited, is sufficient to show that, under the case as now made, the plaintiff cannot recover.

He must bear the consequences of his own negligence, as the situation of Mrs. Conant has been changed by his acts so that in equity she cannot be asked to return the money. She received it in good faith, in satisfaction of a just and equitable claim, and when it was due on honor and in conscience: *Walker v. Conant*, 65 Mich. 197, 198.

And the authorities are uniform that where the money is received in good faith, and in the ordinary course of business, and for a valuable consideration, it cannot be recovered back because the money was fraudulently obtained of some other person by the payor.

To hold otherwise would be to put every man who receives money in the due course of his business upon inquiry, at his peril, as to the manner in which such money was procured by the payor: *Justh v. Bank*, 56 N. Y. 484; *Mason v. Waite*, 17 Mass. 568; *Warren v. Haight*, 65 N. Y. 171, 178; *Reed v. Bank*, 6 Paige, 337; *Currie v. Misa*, 12 Moak, 592, 605; *Watson v. Russell*, 31 L. J. Q. B. 304; *Rapalje v. Emory*, 2 Dall. 51, 54; *Stevens v. Board etc.*, 79 N. Y. 183.

The judgment should be affirmed, with costs.

SHERWOOD, C. J., dissented, and claimed that from the facts Mrs. Conant did not release her debt against Mr. Van Riper by releasing her mortgage. It remained as good as ever. Mr. Walker never received anything for the money he gave her, and the only thing she parted with was the worthless mortgage which she discharged. It would be inequitable and unjust to allow her to keep the money she got from Walker, as that would permit her to reap the fruits of Van Riper's forgery. Morse, J., having said in his opinion that "her situation is changed, and, without her fault, beyond all possible return or restoration," to this Judge Sherwood replied that this is true if it is merely meant to say that she has canceled a forged note and mortgage for a loan of money, but if it was intended to convey the idea that if she is obliged to return the money so received, her legal or equitable rights are changed, his inability to discover the change is acknowledged, as she never

had any right of any kind to such money, unless the forged papers are regarded as legal. Her only valid claim was against Van Riper, but she never had such a one against Walker. When he paid her the money, it was under a mutual mistake of facts. It would be unjust and inequitable to hold such payment valid and give the payee the benefit thereof, and consent will not be given to transactions which give the acts of a felon the same force and effect of those of honest people. Although it is said that Mrs. Conant lost her note and mortgage, and with them the power to collect her debt, still it is difficult to see how her possession could have aided such collection. The forgery is not questioned, while the evidence to prove it is conceded to be sufficient. The record does not show, nor is any reason given, why the forged papers would have aided her in collecting of the insolvent forger. The reason she released her mortgage was because Walker gave her the money, and she would not cancel it until then. The right to have the money thus exacted returned does not work an injustice, as no *bona fide* rights of other innocent persons have intervened or are involved, which need protection. Upon the whole, the judgment should be reversed, and a new trial awarded, for the reason that Mrs. Conant received Walker's money without consideration, and upon a pure mistake of facts, without blame or fault attaching to either party.

PAYMENT. — Money paid by mistake which arose from the fault or negligence of the party paying cannot be recovered, if a recovery would prejudice the party who has received it: *Ellis v. Ohio etc. Co.*, 4 Ohio St. 628; 64 Am. Dec. 610.

CROSS v. LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY.

[60 MICHIGAN, 363.]

RAILROADS — NEGLIGENCE — DUTY TO KEEP WAY IN REPAIR. — It is the duty of a railway company to keep a recognized way to and from its depot in a reasonably safe condition for the passage of the public.

RAILROADS — NEGLIGENCE — DUTY TO KEEP PASSAGE-WAY IN REPAIR. — Where a hole causing an injury is so near a recognized way, used by people coming and going to and from a railway depot, that a person traveling the way might, by making a false step, or by stumbling therefrom, fall into such hole, it is the duty of the railway company to keep it guarded, and a failure to do so makes the company liable for the injury, if proper care was exercised by the injured party.

RAILROADS — NEGLIGENCE QUESTION FOR JURY. — Where damages are claimed for an injury caused by falling into a hole near a recognized way, used by people in going to and coming from a railway depot, the questions of the proximity of the hole to the traveled way, and whether the plaintiff was negligent in falling into it, are for the jury.

EXPERT EVIDENCE. — In an action to recover damages caused by falling into a hole near a recognized way, used by people in going to and coming from a railway depot, the testimony of a civil engineer that the hole was a dangerous place, and needed protection, is admissible.

WITNESS — ABSENCE OF — RIGHT OF COUNSEL TO COMMENT UPON. — While defendant's counsel has the right to comment upon the absence of a ma-

terial witness, he has no right to ask instructions that his absence militated against plaintiff, or that the jury might guess that she was not called because her version of the transaction would have hurt his case.

Weaver and Weaver, George C. Greene, and Oscar G. Getzen-Danner, for the appellant.

Sawyer and Knowlton, for the plaintiff.

MORSE, J. The plaintiff sues for injuries received by a fall into a hole upon the station-grounds of the defendant at Pittsford, Michigan.

On the second day of October, 1885, the plaintiff, a passenger on defendant's train, reached Pittsford in the night. It was dark and rainy. He lived at Chelsea. Went to Pittsford that day, and took passage on defendant's road to Hillsdale. When he returned to Pittsford there were no lights about the grounds outside of the depot. A Mrs. Cole was with him. They left the depot to go to her residence. To reach the main street of the village, they had to travel east from the depot. On his way, and while on the grounds of the company, he fell into a hole about two feet and eight inches deep, permanently injuring his ankle. The accident happened about midnight. Mrs. Cole fell into the same hole.

The station-house of the defendant is about thirty rods west of the main portion of the village. The railroad runs nearly east and west, bearing somewhat to the north as it goes to the west. The principal streets of the village are State and Market, crossing each other at right angles some ten or fifteen rods to the north of the railroad. Market Street, running east and west, extends to the station-grounds.

A few feet to the west is the culvert, at the end of which is the hole into which the plaintiff fell. The railroad track or right of way intersects the south line of Market Street, cutting it off, and reducing its width to about thirty-six feet at its extreme west end. The station-building is on the north side of the railroad track, and the distance from the passenger-depot to the west end of Market Street is about 235 feet. From the west end of this street there is a wagon-way, running westerly along the north side of the railway, north of the station-building, and still on west to a north and south highway or village street; this route, by the consent of the defendant company, being used by the people of the village and the surrounding country as a public highway past the station, as well as a means of ingress and egress to and from the depot. There are

no other means of direct access to the depot by wagons, from the west. Along the east end of the depot is a platform over which passengers go to and from the cars. Near the north end of this platform is a gravel and timber walk, extending easterly in a direct line to the south side of the west end of Market Street. This walk has been there some fifteen years, and was constructed of timbers five by ten inches set up edgewise, and filled in between solid with gravel, making a walk somewhat elevated above the ground on either side. This walk was built by the railway company, and kept up by it, for the use of foot-men coming to and going from the depot. On the north side of Market Street there is, and had been for some years, a plank sidewalk, extending from State Street to the railway grounds. This was used by many people passing to and from the depot.

It is claimed by the defendant that there was a gravel walk on the south side of Market Street, commencing at the termination of the timber and gravel walk of the defendant, and running easterly to State Street; but this is denied by the plaintiff. The evidence fails to disclose any considerable travel along the south side of Market Street. The testimony shows that the bulk of the foot travel, for many years, to the depot, from the east, came along the plank sidewalk on the north side of Market Street, and then diagonally across the wagon-road and the culvert to a point on defendant's timber walk, near two trees, and then on the timber walk to the depot; that the same route was used in going from the depot, not only by the public generally, but by the station agent and other employees of the railroad.

It is claimed by the defendant that at the west end of Market Street the railroad company had for many years maintained a walk, running nearly north and south, connecting the plank walk on the north side of Market Street with the east end of the timber and gravel walk of the defendant. This is denied by the plaintiff. The evidence of the witnesses in his behalf tended to show that at the time of the accident, and for a long time prior thereto, this walk, if it ever existed, had been sunken out of sight, and gone out of use; also, that the timber and gravel walk of the defendant, terminating at the south side of the west end of Market Street, from such terminus west to the two trees, was never used by passengers to any great extent, and at the time of the injury to plaintiff had gone to decay, and was not safe, by reason of

holes in it, in the night-time, and had not been used for some time.

The testimony of plaintiff's witnesses also tended to show that between this diagonal path and the west end of Market Street, and north of the east end of the timber and gravel walk, there was, in wet weather, a mud-hole, which, at the time of the accident, extended so far to the north as to crowd the diagonal path nearer the culvert hole than usual, the travel then being within two feet of it. This hole was not barricaded or otherwise guarded, nor was its presence indicated by any light or other signal.

The main controversy turns upon the right of passengers coming to or leaving defendant's train to use this diagonal path or traveled way. It was insisted upon the trial below, and it is also argued here, that the railroad company had provided a convenient and reasonably safe means of egress from its cars and station by the way of the timber and gravel walk, and the cross-walk from that to the plank walk on the north side of Market Street; that by so doing the company had fulfilled its whole duty to the public and to its passengers, and if the plaintiff was injured in an attempt to reach the village by some other route, he can have no remedy against the defendant.

In accordance with this theory, the defendant's counsel requested the circuit judge to charge that "if the plaintiff left the gravel walk, and went diagonally across toward the plank walk, and in so doing fell into this excavation, he cannot recover"; and in other requests asked instructions of similar import. The court refused to so charge the jury, but instructed them, in substance, that if the defendant had, without objection, notice, or protest, permitted its passengers to cross its depot-grounds on this diagonal line or walk, then it was its duty to keep its grounds along and near such walk or way in reasonably safe condition for the coming and going of its passengers, by guards, fences, and lights, so as to enable such passengers to avoid any hole or other obstruction by, on, or in which such passengers might be injured; and if the fact of the permission of such use was found, as aforesaid, it made no difference that there was another and safer way by which the plaintiff might have passed out; that if this diagonal way had been a public and common way, to the knowledge of the defendant, for any considerable length of time, so that it became one of the ways, recognized by the company and its agents, to go to and from its depot, then it was its duty to keep

it reasonably safe to go and come upon, the same as it would a route which it had actually provided; "and the simple fact that they had provided another way by which every passenger could have gone, and some did go, is not a question at issue in this case."

I find no conflict in the evidence as to the following facts:—

1. The hole into which plaintiff fell was upon the station-grounds of the defendant.

2. It was left entirely unguarded, by night or by day.

3. The diagonal way was traveled by nearly all the people coming from or going to the depot.

4. No objection was ever made by the railroad company, or any of its agents, to its use. The employees of the defendant used it, and it was recognized as the most common way of all, and was, by usage and implied permission, at least, one of the regular ways to and from the depot.

The jury were undoubtedly correct in the finding of facts, and the court was right in his theory of the law.

This diagonal walk being a recognized way to and from the depot, it was the duty of the defendant to keep it reasonably safe: 1 Rorer on Railways, 476; Smith on Negligence, 2d ed., *126, *188; Cooley on Torts, 605; *Dolaney v. Milwaukee etc. R'y Co.*, 33 Wis. 67; *Hulbert v. New York Cent. R. R. Co.*, 40 N. Y. 145; *Dillaye v. New York etc. R. R. Co.*, 56 Barb. 30; *Gaynor v. Old Colony etc. R'y Co.*, 100 Mass. 208; 97 Am. Dec. 96; *Tobin v. Portland etc. R. R. Co.*, 59 Me. 183; 8 Am. Rep. 415; *Hoffman v. New York etc. R. R. Co.*, 75 N. Y. 605; *Cartwright v. Chicago etc. R'y Co.*, 52 Mich. 606; 50 Am. Dec. 274.

The hole in question was near enough this diagonal walk, if the testimony upon the part of the plaintiff was accepted by the jury that a person traveling the same might, by making a false step, or by stumbling from the path, fall into it. In such case the defendant would be liable for the injury, if proper care was exercised by the plaintiff: *Hardcastle v. South Yorkshire R'y etc. Co.*, 4 Hurl. & N. 67; *Barnes v. Ward*, 9 Com. B. 392; *Hadley v. Taylor*, L. R. 1 Com. P. 58; Cooley on Torts, 660; Wood on Nuisances, sec. 271; 1 Addison on Torts, sec. 245; *Pickard v. Smith*, 10 Com. B., N. S., 470; *Bishop v. Bradford Charity Trustees*, 1 El. & E. 697; *Wilkinson v. Fairrie*, 32 L. J. Ex. 73; *Binks v. South Yorkshire R'y etc. Co.*, 32 L. J. Q. B. 26; *Hounsell v. Smyth*, 29 L. J. Com. P. 203; *Wettor v. Dunk*, 4 Fost. & F. 298; *Indermaur v. Dames*, L. R. 1 Com. P. 274.

The situation of this hole, its proximity to the traveled path, and whether the plaintiff was negligent in falling into it, were questions of fact for the jury, and were properly submitted to them.

The court did not err in instructing the jury that it was a question of fact for them to determine, if they found this diagonal way a common one, and the defendant permitted passengers to use it, whether or not the defendant should have kept some guide, guard, or light, or some way by which a man would be kept out of it. It was for the jury to locate this hole in its relation to the pathway; and if they found it so near the way that a man, in the "ordinary aberrations of travel," might fall into it, then, as a matter of law, it should have been guarded.

The defendant cannot complain, because, under all the evidence, this hole was upon the station-grounds of the company, and near enough to be dangerous to persons traveling the diagonal way at night. The court could have safely told the jury that, if they found this way recognized and permitted by the railroad company, it was negligence in the defendant leaving it in the condition it was.

There was no error in the admission of evidence. The testimony of the civil engineer (Davis) that this hole was a dangerous place, and needed protection, comes squarely within the rule settled in this state in the case of *Laughlin v. Street R'y Co.*, 62 Mich. 220.

Mrs. Cole, who was injured at the same time by falling into this same hole, was not called by the plaintiff as a witness in his behalf, and she did not testify upon the trial. The defendant's counsel requested the court to charge the jury "that the failure of the plaintiff to call Mrs. Cole—the unexplained failure—is a matter that the jury may take into consideration as to whether or not her testimony would have hurt plaintiff if he had called her."

The court refused to so charge, and said: "It would be, in my opinion, equally forcible if the other side should ask me to charge that because the defendant failed to bring Mrs. Cole here, her evidence would have been against them, and she would swear as Cross has. The presumption is as much one way as the other."

We think the court was correct in his refusal, and right as to the presumption. If she was within reach of the process of the court, either party had, as far as the record shows, equal

facilities for bringing her into court as a witness; and the mere fact that either failed to do so raised no presumption that she would testify against their particular theory of the accident. But there was nothing to show that she was accessible as a witness. The counsel for the defendant had the right to make such proper comments upon her absence as the facts warranted, but he had no right to call upon the court to instruct the jury that her absence militated against the plaintiff, or that they might guess that she was not called by him because her version of the transaction would have hurt his case.

Neither do we think that the story told by the court had any tendency to injure the defendant. The propriety of it may well be doubted, but we are not prepared to hold that its recital or application was harmful error.

The case, under the conceded facts, seems to be a plain one, and we have no doubt that the finding of the jury was correct, and the case fairly tried and correctly submitted, under the law, by the court.

The judgment is therefore affirmed, with costs.

RAILWAY COMPANIES. — As to the duty of railway companies to keep their stations and grounds in a safe condition for the use of their patrons and the public: *Missouri P. R'y Co. v. Neiswanger*, 41 Kan. 621; *ante*, p. 304.

NEGLECTENCE IS ORDINARILY A QUESTION to be decided by a jury: *Bridger v. Ashville etc. R. R. Co.*, 27 S. C. 456; *post*, p. 653, and note; *Durbin v. Oregon etc. R. R. & N. Co.*, 17 Or. 5; 11 Am. St. Rep. 778, and cases collected in note 785.

EXPERTS, WHO ARE, AND IN WHAT CASES EXPERT TESTIMONY is admissible: Note to *Hammond v. Woodman*, 66 Am. Dec. 228-246; *Smith v. Sherwood Township*, 62 Mich. 160; *Laughlin v. Street R'y Co.*, 62 Id. 220.

STERLING v. JACKSON.

[69 MICHIGAN, 483.]

PUBLIC LANDS — SWAMP-LAND ACT — STATE PATENT. — The act of Congress of September 28, 1850, known as the swamp-land act, conveyed to each of the states respectively in fee all lands within the purview, and title thereto vested in the state from the date of such act; and the patent which afterwards issued for such land is only evidence of the grant, and not of the date on which the grant took effect.

PUBLIC LANDS — SWAMP-LAND ACT — RESERVATIONS FOR LIGHT-HOUSE PURPOSES. — Reservations made by the commissioner of the general land-office, after the act of Congress of September 28, 1850, known as the swamp-land act, went into effect, from the lands granted by such act for light-house purposes, are null and void.

PUBLIC LANDS — NAVIGABLE WATER — HUNTING RIGHTS. — Where, at the time of the passage of the swamp-land act, by Congress, on September 23, 1850, there was a shore between such lands in Michigan and Lake Erie which separated such land from the lake, but since that time the waters from the lake have forced a way through such shore and converted such swamp-land into a bay, and such land, covered by navigable water, has been patented to the state, and by it patented to an individual, his title so acquired is subject only to the public right of navigation so long as he allows the bay to remain part of the lake, and he has the exclusive right to use the waters of such bay for the purpose of shooting wild fowl thereon.

PUBLIC LANDS — HUNTING RIGHTS. — The grant of swamp and overflowed lands under act of Congress of September 23, 1850, was effective to vest title to submerged land, and a state patent passed such title as it had; and if, prior to its date, a portion of such land had become submerged by the slow and imperceptible encroachments of the waters of the Great Lakes, the state would still be the owner, and could grant the bed of the lake to its patentee, so as to invest him with the exclusive right of fowling thereon, so long as such grant did not interfere with private vested rights.

HUNTING RIGHTS. — EVERY PERSON HAS AN EQUAL RIGHT of taking, for his own use, all creatures fit for food that are wild by nature, so long as he does no injury to another's rights; but as every person has the right of exclusive dominion as to the lawful use of land owned by him, no other can hunt or sport upon his land but by his consent. He has the exclusive right of hunting and sporting upon his own land, whether it be upland or covered with water.

J. R. Rauch, C. R. Whitman, I. P. Christianity, A. C. Angell, William H. Wells, and I. C. Walker, for the appellant.

George M. Landon, I. R. Grosvenor, and F. A. Baker, for the plaintiff.

CHAMPLIN, J. This is an action for trespass upon land covered with water, situated on fractional section 11 north of private claim, township 7 south, range 9 east.

The declaration alleges that defendant broke and entered plaintiff's close, and with his boat, oars, and paddle, in rowing and punting, broke down and destroyed the wild rice and grass there growing, and with his gun shot at, wounded, and killed and frightened away the wild ducks and other game there resting and feeding, and other injuries, etc.

The defendant pleaded the general issue, and gave notice that he would show that the premises upon which the injuries were supposed to have been committed were a common highway, and free to defendant, and by virtue thereof, and in use thereof, he did all and singular the acts complained of, as he lawfully might.

Upon the trial of the cause in the circuit court a patent was

offered in evidence from the United States to the state of Michigan covering the land in question, purporting to be executed in conformity to the act of Congress of the United States, of date September 28, 1850, granting land to the state of Arkansas and other states, to reclaim the swamp-lands within their limits, to the introduction of which in evidence objection was made, for the reason that the patent, which bore date the sixteenth day of August, 1882, was issued without legal authority. The objection was overruled, and the patent admitted. It recited that the lands thereby conveyed had been selected pursuant to the provisions of said act. The ruling of the court is assigned as error.

It is claimed by counsel that the want of legal authority to issue the patent consists in the fact that, prior to its issue, the land in question was reserved for light-house purposes. But no such fact appeared at the time the patent was offered in evidence, and the reason of its invalidity was not then stated.

There are two sufficient answers to the objection: 1. There is no competent evidence in the case that the land was ever reserved for light-house purposes. A map was introduced of a survey made by William Ives, deputy surveyor of the United States, upon which certain lands lying along the shore of Lake Erie were shaded green, and such shading covered the *locus in quo* the shooting was claimed to have been done, and upon the margin of this map there appears the following memorandum: "The tracts embraced in the green shade are reserved for light-house purposes. See commissioner's letter, June 14, 1852."

Another map was introduced from the office of the register of deeds of the county of Monroe of the same survey, but upon a reduced scale, concerning which counsel for defendant asked the witness S. M. Bartlett, a surveyor: "What does this green shade indicate? What lands?" To which he replied: "Lands resurveyed for light-house purposes." This was all the evidence upon that point. It is needless to say that it fell far short of proving it.

Had it been proved that these green-shaded lands had been reserved in 1852 for light-house purposes, it would not have affected the validity of the patent. These lands were granted by the act of September 28, 1850, by the general government to the state of Michigan, and the title vested in the state at that date, and the reservation, if any was made in 1852, was of no legal validity. The patent issued in 1882 was simply

evidence of the previous grant, which took effect when the act of Congress became a law.

Plaintiff introduced in evidence a patent from the state of Michigan to William C. Sterling, and claims title through this patent.

Considerable evidence was introduced showing the present character of the land in dispute, from which it pretty conclusively appears that it bears the description of lands granted by act of Congress as "marsh and overflowed lands."

Plaintiff's testimony tended to show that, at the time of the survey in 1850, there was a shore of Lake Erie running along continuously eastwardly of the place where defendant was when he did the shooting, a distance of more than two hundred feet, consisting of a sand bank, upon which grew a few trees and bushes. East of this bank was Lake Erie, and west of it there was an extensive marsh, grown up with weeds, wild rice, and rushes, and mostly covered with shallow water. Through this marsh ran what was known as Sandy Creek, and about eleven chains to the southwardly from where the trespass is alleged to have been committed, there was a portage over this bank to Sandy Creek. The existence of this portage was proved, and seems not to have been disputed. The fact that there was such portage is pretty conclusive proof that in 1850 this bank spoken of formed a continuous shore where now appears open water. At some time since 1850, but at what particular period the testimony does not establish, the waters of Lake Erie have penetrated through this bank, and made a passage, at first narrow, but increasing in width year by year by the action of the water, so that the shore line, consisting of a sand bank, has been thrown backward and inward, and has formed a well-defined bay, with a distance of over fifteen hundred feet from headland to headland. The shore or boundary between the lake and marsh does not form a continuous line, but leaves an opening at the western extremity of the bay, through which the waters of the lake unite with those of Sandy Creek. This opening is about 759 feet wide, and is known as the Cut.

There was a large amount of testimony introduced to show that this bay, as well as Sandy Creek, was navigable water, and in the disposition made of the case in the court below the fact was conceded that it was navigable, and used as such, and I shall consider that fact as established.

It is also a conceded fact that defendant was in a boat in

the navigable waters of the bay, and by the aid of some rushes that grew up through the water, and a structure called a hide, and several artificial ducks as decoys, was engaged in shooting wild ducks upon the premises covered by plaintiff's patent; that he was requested to desist, and leave the premises, by plaintiff, through his agent, but refused so to do, claiming the right to be where he was, and to shoot ducks and game, because he was in the navigable waters of Lake Erie.

A point is made by counsel for defendant that at the time the state issued its patent for this land in 1888, the shore had washed away, and the bay existed as a part of the waters of Lake Erie, and the mere grant of the land could convey no greater rights, as to fishing and shooting, to the grantee than the grantor had.

It seems to me that plaintiff is unaffected by the changed condition of the shore. In my opinion, the grant was effective to pass the title to the submerged land. The patent from the state passed such title as it had; and if, prior to its date, a portion of the land had become submerged by the slow and imperceptible encroachments of the waters of the lake, the state, unlike a private person, still would be the owner, and could grant the bed of the lake to whom it chose, so long as such grant did not interfere with private vested rights: *Smith v. Levinus*, 8 N. Y. 472. Under other circumstances it might require some legislation to authorize the governor to convey; but with regard to swamp-lands, the legislature had already provided for their disposition: Laws 1851, p. 322; Laws 1858, p. 169; Laws 1869, p. 164. Especially could the state pass the title when the land was received by it as swamp and overflowed lands; for, as remarked by Mr. Justice Field in *Savings Union v. Irwin*, 28 Fed. Rep. 708, 712: "The act of 1850 grants swamp and overflowed lands. Swamp-lands, as distinguished from overflowed lands, may be considered such as require drainage to fit them for cultivation. Overflowed lands are those which are subject to such periodical or frequent overflows as to require levees or embankments to keep out the water, and render them suitable for cultivation. It does not make any difference whether the overflow be by fresh water, as by the rising of rivers or lakes, or by the flow of the tides. When drainage, reclamation, or leveeing is necessary to enable the farmer to use them for some of the ordinary purposes of husbandry, the lands are within the terms of the act of Congress, and the title passed by it to the state."

And again, in *Wright v. Roseberry*, 121 U. S. 496, he said: "The object of the grant, as stated in the act, was to enable the several states to which it was made to construct the necessary levees and drains to reclaim the lands. . . . The early reclamation of the lands was of great importance to the states, not only on account of their extraordinary fertility when once reclaimed, but for the reason that until then they were the causes of malarial fevers and diseases in the neighborhood."

Can it be doubted that plaintiff has the right to construct a levee or embankment along the original shore line, and thus exclude the water and the public from his premises? The very purpose Congress had in view when it granted the lands was that the swamps should be drained, and the overflowed lands reclaimed; and the act contains a proviso, "that the proceeds of said lands, whether from sale or by direct appropriation in kind, shall be applied exclusively, as far as necessary, to the purpose of reclaiming said lands by means of levees and drains aforesaid."

The state received these lands clothed with this trust declared in the body of the act. How far it has discharged such trust is a question I shall not enter upon.

It may be remarked, however, that Congress had not the remotest intention of granting these lands for game preserves, to be bought up and controlled by individuals or clubs. While I have no doubt that plaintiff may, for the purpose of reclaiming this land, construct levees or embankments, and thus shut out the waters of Lake Erie, and the public as well, yet, while he permits it to remain as a part of the navigable water of Lake Erie, there is an implied license to the public, under which the public have the right to navigate the same, and to exercise all such rights as are incident to navigation, and it is also subject to such rights as the public have in the navigable waters of the state.

The plaintiff claims the exclusive right of hunting within the territory covered by his patent from the state. He founds this right upon his proprietary interests in the soil under the water. He does not deny, so long as the premises remain in their present condition, that the public have a right of navigation over his land, but he claims such right is a mere easement, and extends simply to a right of passage over his lands in such vessels as are capable of navigating the water over the same. He insists upon the exclusive right to hunt and to capture all wild game while on his own premises, and that this

right of capture is as much a right of property as the right to make any other use of his own premises. He cites, in support of these propositions, the following authorities: *Moore v. Sanborns*, 2 Mich. 519; 59 Am. Dec. 209; *Thunder Bay Booming Co. v. Speechly*, 31 Mich. 336, 342; 18 Am. Rep. 184; *Lorman v. Benson*, 8 Mich. 18; 77 Am. Dec. 435; *Rice v. Ruddiman*, 10 Mich. 125; *Grand Rapids Booming Co. v. Jarvis*, 30 Id. 319; *Attorney-General v. Ewart Booming Co.*, 34 Id. 474; *Ewing v. Colquhoun*, L. R. 2 App. C. 839; *Walker v. Board etc.*, 16 Ohio, 544; *Braxon v. Bressler*, 64 Ill. 488; *June v. Purcell*, 36 Ohio St. 396; *Ross v. Faust*, 54 Ind. 471; 23 Am. Rep. 655; *Berry v. Snyder*, 8 Bush, 266, 285; 96 Am. Dec. 219; *Overman v. May*, 35 Iowa, 89; *Washington Ice Co. v. Shortall*, 101 Ill. 46; 40 Am. Rep. 196; *McFarlin v. Essex Co.*, 10 Cush. 309; *Adams v. Pease*, 2 Conn. 484; *Cooley on Torts*, 329; *Waters v. Lilley*, 4 Pick. 145; 16 Am. Dec. 333; *Goff v. Kille*, 15 Wend. 550; *Blades v. Higgs*, 12 Com. B., N. S., 501; 13 Id. 866; *Ferguson v. Miller*, 1 Cow. 248; 18 Am. Dec. 519; *Gillet v. Mason*, 7 Johns. 16; *Gould on Waters*, secs. 93 a, 158, 159.

The defendant's counsel contend that, the bay being navigable, and free to the public for passage, the defendant, as one of the public, had a right to go upon the waters, and shoot as he did; that the entry upon the bay in his boat was no trespass; that having the right, as one of the public, to pass over these waters, and to be where he was, he had the right to fish in them, to shoot from his boat wild ducks flying over them from the open lake, and to anchor his decoys to attract such ducks; that the ownership of the soil is a qualified ownership, subject to the public and common right of passage, fishing, and shooting wild birds. In support of this, he cites the following authorities: *Pearce v. Scocher*, L. R. 9 Q. B. D. 162; *Weston v. Sampson*, 8 Cush. 347; 54 Am. Dec. 764; *Martin v. Waddell*, 16 Pet. 367; *Smith v. State*, 18 How. 74; *Collins v. Benbury*, 3 Ired. 277; 36 Am. Dec. 722; *Browns v. Kennedy*, 5 Har. & J. 196; 9 Am. Dec. 503; *State v. Franklin Falls Co.*, 49 N. H. 240; 6 Am. Rep. 513; *Carson v. Blaser*, 2 Binn. 475; 4 Am. Dec. 463; *Sloan v. Bismiller*, 34 Ohio St. 492.

We have not been cited to any adjudicated case where this question has arisen. Both parties have presented it on the analogies of the right to fish in public navigable waters; and counsel for both parties insist that, if the case is to be governed by the right of fishing, it should be decided for their clients. Both appeal to the doctrine of the common law, and find their

vindication in its precepts. One asks for the application of the doctrine of the right of fishing in navigable waters where the tide ebbs and flows; and the other is best suited with the common law as applied to non-tidal or fresh-water streams.

While the questions of fishing and hunting are in principle somewhat analogous, yet they have always, in England, been treated as separate subjects of legislation and regulation. The forest and game laws of England have always been treated under a separate code, distinguished for its tyrannical inhibition of the common rights of the subject, and detestable for the cruel punishments inflicted for trivial offenses: 2 Bla. Com. 411 et seq.; Com. Dig., tit. Justices of the Peace, B, 43, 45-49. The common law, which recognized the right of hunting and of property in wild animals to be a royal prerogative, and to vest in the king, has no existence in this country, where no king and no royal prerogative exist. Here the sovereign power is in the people, and the principle, founded upon reason and justice, obtains, that by the law of nature every man, of whatever rank or station, has an equal right of taking, for his own use, all creatures fit for food that are wild by nature, so long as he does no injury to another's rights. Laws have been passed to protect game during certain seasons, with a view to their preservation, but none denying the right of any person to capture or kill game in the allotted season. This right is restricted only as to place.

Since every person has the right of exclusive dominion as to the lawful use of the soil owned by him, no man can hunt or sport upon another's land but by consent of the owner. It will be conceded that the owner of lands in this state has the exclusive right of hunting and sporting upon his own soil. Whatever may be the view entertained when the land belongs to the United States or to the state, there can be no question when the land passes to the hands of private owners.

The defendant claims that he had the right to shoot the wild fowl from his boat, because, as the waters were navigable where he was, he had the right to be there; that there being no property in wild fowl until captured, if he committed no trespass in being where he was, no action will lie against him for being there and shooting the wild duck. There is a plausibility in the position, which, considered in the abstract, is quite forcible, and, if applied to waters where there is no private ownership of the soil thereunder, would be unanswerable. But, so far as the plaintiff is concerned, defendant had

no right to be where he was, except for the purpose of pursuing the implied license held out to the public of navigating the waters over his land. So long as that license continued, he could navigate the water with his vessel, and do all things incident to such navigation. He could seek the shelter of the bay in a storm, and cast his anchor therein; but he had no right to construct a hide, nor to anchor his decoys for the purpose of attracting ducks within reach of his shotgun. Such acts are not incident to navigation, and in doing them defendant was not exercising the implied license to navigate the waters of the bay, but they were an abuse of such license.

The same claim, that the defendant was where he had a right to be when he did the shooting, was made in the case of *Carrington v. Taylor*, 11 East, 571. That was an action on the case. The plaintiff was possessed of a certain place prepared with suitable and proper conveniences for decoying and catching wild fowl, commonly called a decoy, and had been accustomed to catch wild ducks, etc., in his decoy, which was situated on one of the salt creeks, called the Blackwater River, where the tide ebbed and flowed. The defendant sought his livelihood, in part, by shooting wild fowl from his boat on the water, for which boat, with small arms, he had a license. The only proof of the disturbance by the defendant was, that, he being out in his boat shooting wild fowl in a part of the open creek, first fired his fowling-piece within about a quarter of a mile of the plaintiff's decoy, when two or three hundred wild fowl came out; and afterwards approached nearer, and fired again at a wild fowl upon the wing, at the distance of about two hundred yards and upwards from the decoy-pond, when he killed several widgeons, and immediately upon the noise of the gun four or five hundred wild fowl took flight from the pond, but it did not appear that he fired into the decoy. The learned judge left this as evidence to the jury of a willful disturbance of the plaintiff's decoy by the defendant, for which this action would lie. The jury found a verdict for plaintiff. On a motion to set this verdict aside as being against law and evidence, counsel for defendant claimed that, the defendant having a right to shoot at the wild fowl in the place where he was, which was an open creek or arm of the sea, where the tide flowed and reflowed, and not having gone upon the plaintiff's land, nor fired into his decoy at the birds there, the verdict should be set aside. The court, however, said that they saw no ground for disturbing the ver-

dict in point of law, and that the evidence was proper to be left to the jury.

Another case is that of *Keeble v. Hickeringill*, 11 Mod. 73, 130; 8 Salk. 9; and Holt, 73, 130. It is also reported, from Lord Holt's MS., in 11 East, 574. The action was trespass on the case for disturbing plaintiff's decoy. The defendant was lord of a manor, and had a decoy; and the plaintiff had also made a decoy upon his own ground, which was next adjoining to defendant's ground and pretty near also to defendant's decoy, and therein the plaintiff had decoy and other ducks, whereof he made considerable profit. It appears from the report of the case in Holt, 73, that the defendant was upon his own land when he shot off his gun. The declaration alleged that defendant resorted to the head of plaintiff's pond, and there discharged six guns laden with gunpowder, and with the noise and stench drove away the wild fowl then being in plaintiff's pond, with design to damnify the plaintiff, and to frighten away his wild fowl from his decoy. It was held the action would lie.

The same principle is maintained by the supreme court of Ohio in *State v. Shannon*, 36 Ohio St. 423; 38 Am. Rep. 509. The court declared the right of private ownership in the bed of the Sandusky River to be in the riparian proprietor. In this case, Shannon was arrested for violation of a statute which made it penal for any person who, having received written or verbal notice from any owner of inclosed and improved lands, or any lands, the boundaries of which are defined by stakes, posts, watercourses, or marked trees, not to hunt thereon, should shoot at, kill, or pursue, with such intent, on such lands, any of the birds or game mentioned in the act concerning game, or upon any land upon which a notice is posted in a conspicuous place that "no shooting or hunting allowed on these premises." The complaint charged Shannon with shooting and killing wild ducks on the land of Tindall, situate in said county, etc.

Tindall was the owner of land bounded on one side by the Sandusky River, a navigable stream; and Shannon, on the 29th of October, 1877, when the killing of wild duck was not prohibited by statute, was in a skiff on Sandusky River, between the middle thereof and the shore owned by Tindall, from which position he shot and killed wild ducks swimming in and flying over the water between said shore and the middle of the river. Boards inscribed in legible

English characters, "No shooting or hunting allowed on these premises," were set up in conspicuous places on the shore, and Shannon had been notified by Tindall not to shoot or hunt on his lands. The position occupied by Shannon on the river was within the limits of navigation as used by boats and other water-craft engaged in commerce, and the public generally had been accustomed to fish and kill wild ducks in the same location upon the river. McIlvaine, C. J., in delivering the opinion, said: "It is claimed, however, that this statute was not intended to protect lands covered by the waters of a navigable river. A majority of the court can see no grounds upon which lands covered by navigable streams should be excluded. They are as much the subject of private ownership as unnavigable streams. There is no distinction between them made by the terms of the statute. True, navigable streams, in this state, are declared to be public highways; but the right to use a public highway is not abridged by protecting the owner of the fee in the exclusive right of killing game therein. Travel and commerce are not thereby hindered. And as the power of the legislature to protect game, or the exclusive right of the owner of land to kill the same on his own premises, is as ample over land covered by water, whether navigable or unnavigable, as it is over dry land, and as there is no attempt to distinguish between them in this statute, we must hold that all alike are within the protection of this statute."

In each of these cases the defendant "was where he had a right to be" at the time he committed the grievance complained of; nevertheless, this fact did not justify him in doing an act, the direct consequence of which was to injure the owner of the land, for his own benefit. It does not follow that because a person is where he has a right to be, he cannot be held liable in trespass. A person has the right to drive his cattle along the public highway, but he has no right to depasture the grass with his cattle in the highway adjoining the land of another person. Also, a person has the right to travel along a public highway, but this gives him no right to dig a pit, or remove the soil, or encumber it in front of lands belonging to others.

In the case under consideration, the defendant had the right of using the waters of the bay for the purpose of a public highway in the navigation of his boat over it; but he had no right to interfere with the plaintiff's use thereof for hunting, which belonged to him as the owner of the soil. The

public had a right to use it as a public highway, but every other beneficial use and enjoyment belonged to the owner of the soil.

Had this action been in case, with proper averments setting forth plaintiff's ownership and use for sporting, and defendant's interference and disturbance of plaintiff's enjoyment, the authorities last above cited would have supported the action. I am not prepared to say, after verdict, that trespass will not lie under the circumstances of this case; more especially as no question is raised by defendant's counsel that it is not the proper form of action, and as it appears to have been planted to test the plaintiff's right to the private and exclusive use of the land covered by his patent for sporting purposes. As owner of the fee of the soil under the water, I think he is entitled to such exclusive right, and that the judgment should be affirmed.

I may add, in conclusion, that, aside from the ownership of the plaintiff of the *locus in quo*, the only important question in this case is, whether a man has the exclusive right of fowling upon his own land. If he has, it can make no difference with that right whether it be upland or covered with water. As the question of the right to fish in the navigable waters of the Great Lakes at places not affected by private ownership does not arise in this case, I forbear to discuss it. My views upon that subject were expressed in *Lincoln v. Davis*, 53 Mich. 375; 51 Am. Rep. 116.

RIGHT TO FISH OR HUNT ON THE LAND OF ANOTHER. — Campbell and Morse, JJ., each prepared carefully considered dissenting opinions in the principal case, in which they arrived at the conclusion that, without reference to the question of title arising in the case, the defendant had a right to shoot ducks as he did, and where he did, and that the judgment should therefore be reversed. In discussing the question, the ground is taken that it is a well-settled proposition that no one has any property in wild fowl until it is killed or captured by him. It makes no difference over whose land such fowl are flying, or upon whose soil they are resting or feeding. Their passing over or stopping on the premises gives the owner no more property in the fowl than if they were on or over the lands of another. So if a person is rightfully upon the land or water of another, he has the same right with the owner to kill or capture the game thereon, and to hold the same as his property. The question arises, then, Has a person rightfully upon a navigable river, public highway, or any body of navigable water, the right to kill the wild game thereon, or flying over the same? And in the discussion of the question no light can be borrowed from decisions under the game and forestry laws of England, as they are not a part of the common law of this country, but are repugnant and hostile to the theory of our institutions. Therefore, disregarding such laws, the right of fowling must be

determined upon the same principles as the right of fishing. The right to fish in navigable waters, even over private soil, is secured to the public, and it is generally, if not unanimously, held that a mere grant by the state of land covered by navigable water confers upon the grantee no greater rights than he would have had he owned it without such direct grant, and as a riparian proprietor: *Parker v. Oudler Mill Dam Co.*, 20 Me. 353; 37 Am. Dec. 56; *Moulton v. Libbey*, 37 Me. 472; 59 Am. Dec. 57; *Parsons v. Clark*, 76 Me. 478; *Packard v. Ryder*, 144 Mass. 440; *Weston v. Sampson*, 8 Oush. 347; 59 Am. Dec. 764; *Proctor v. Wells*, 103 Mass. 216; *Commonwealth v. Manimow*, 136 Id. 456-458. Under the constitution of Vermont, the privilege of free fishing and fowling on uninclosed lands and boatable waters is secured to the public. So it has been held that the right of fishing in Lake Erie and its bays is not limited to the proprietors of its shores, and that such right is as public as if their waters were subject to the ebb and flow of the tide: *Sloan v. Bismiller*, 34 Ohio St. 492.

In a later case in the same state, it was held that a land-locked bay of Lake Erie, though susceptible of private ownership by grant, still, if such waters were navigable, such ownership must be held subject to the public rights of navigation and fishing, and that no mere grant of the land covered by such waters destroyed this right. The owner has the right, by filling such bay and making solid ground, to thus or otherwise improve his land on which the water rests: *Hogg v. Beerman*, 41 Ohio St. 81, 96; 52 Am. Rep. 71. Judge Morse cited a number of authorities to show that the same rule is applied to the other great inland lakes of the United States, and then said: "If the right of the public to fish in any body of water depends upon its navigability, then, if the navigability is extended, as it is here, to the Great Lakes and other lakes and streams in this state, which are non-tidal waters, then in reason the public right to fish therein ought to follow such navigability as extended by our laws." And referring to the principles laid down in *Hogg v. Beerman*, *supra*, he says: "This seems to me sound doctrine as applied to the case in hand, and that the right to shoot wild fowl upon the water rests upon the same great principle as the right of taking fish therein. Both fish and water-fowl are the property of him who kills or captures them. Neither of them have any relation to or connection with the soil beneath the water, and are in no sense and by no sophistry of reason even a part of the land, and do not make their home upon it, save as they swim in or upon the waters that cover it. They both belong to the water, rather than the land. Both are used largely for food, and are great sources of sustentation to mankind, and the common right and privilege of all to take them upon and in the public waters should never be denied in a free country, or farmed out as a special favor to a fortunate few. In all the cases in the United States, where it has been decided that the exclusive right of fishing belonged to the owners of the banks of the lakes or streams, it has been confined to such lakes and streams as are not navigable in fact, or wholly inclosed within the lands of one proprietor, or the courts have erroneously, as I think, made the same distinction that prevails in England in applying the principles there laid down as to non-tidal waters, without properly taking notice that a navigable stream here is not confined to one having an ebb and flow of the tide, but to any one that is navigable in fact. By the common law of England, fishing is free in all navigable waters. Applying this rule of the common law properly to all our navigable rivers, discarding the question of tide-waters, which cannot prevail here, and the right of the public to fish must be, and ought to be, free in all our streams and lakes that are navigable in fact, and declared navi-

gable under our laws. It seems to me that the ownership of the riparian proprietor in the soil under the water cuts no figure in the solution of the question. The ownership of such soil gives no property to the landed proprietor, either in the fish or the wild fowl, — a proposition, as before shown, which cannot be disputed. They are not like the rocks in the bottom of the stream, or the ice which forms upon its surface. They are wild things, in which no man has property while they are alive and untamed; and I find no case holding that the great inland lakes of this country are not free to all in fishing and fowling. The principles governing non-tidal waters in England are not applied to them; and I know of no sound reason why there should be any distinction made in this respect between these lakes and other navigable waters."

In support of the views above advanced, the learned judge cites *Hooper v. Cummings*, 20 Johns. 90; 11 Am. Dec. 249; *Waters v. Lilley*, 4 Pick. 145; 16 Am. Dec. 333; *Commonwealth v. Chapin*, 5 Pick. 199; 16 Am. Dec. 286; *McFarlin v. Essex Co.*, 10 Cush. 304; *Beckman v. Kreamer*, 43 Ill. 447; *Adams v. Pease*, 2 Conn. 481; *Smith v. Miller*, 5 Mason, 191. Judge Morse then said: "I have been unable to find any case in the United States that prohibits one lawfully upon the water, as in transit upon a navigable river, from taking fish therein with hook and line, and the majority of this court, as it was then constituted, seem to have settled the doctrine in this state that such fishing cannot be complained of by riparian owners" — in *Lincoln v. Davis*, 53 Mich. 391; 51 Am. Rep. 116. It may also be stated in connection with the above doctrine that the right of free fishing in the Susquehanna, Delaware, and other large and navigable rivers in Pennsylvania, though the tide does not ebb and flow in them, is vested in the state, and open to all, and the same rule is applied to the navigable fresh-water streams of many of the other states: *Carson v. Blazer*, 2 Binn. 475; 4 Am. Dec. 463; *Shrunk v. Schuykill Nav. Co.*, 14 Serg. & R. 71; *Tinicum Fishing Co. v. Carter*, 61 Pa. St. 21; 100 Am. Dec. 597; *Cates v. Wadlington*, 1 McCord, 580; 10 Am. Dec. 699; *Collins v. Benbury*, 3 Ired. 277; 38 Am. Dec. 722; 5 Ired. 118; 42 Am. Dec. 155; *Wilson v. Forbes*, 2 Dev. 30; *Boatwright v. Bookman*, 1 Rice, 444; *Fagan v. Armistead*, 11 Ired. 433; *Palmer v. Hicks*, 6 Johns. 133; *Rogers v. Jones*, 1 Wend. 237; *Delaware etc. Co. v. Stump*, 8 Gill & J. 479. "The right to take fish with hook and line in the navigable waters must necessarily," says Judge Morse, "carry with it the right to stop and anchor one's boat, and to stay in one place for shorter or longer periods, as the occasion may require. If the riparian owner owns the soil in the bed of the stream, yet nevertheless, such anchorage is no damage to him, unless he owns also the fish in the river, or has the exclusive right of taking them therein. There is no injury to his property by such anchorage, and there can be no claim for damages without injury; and it seems to me that the principle governing and controlling the right to fish with hook and line must govern and control the right to shoot wild ducks, as exercised by the defendant in this case."

After expressing the unqualified opinion that the public have the right to fish or hunt upon the navigable waters and rivers of Michigan, regardless of the question as to who may own the title to the land beneath them, he says: "In my opinion, in the solution of this case, it makes no difference whether the plaintiff owns the soil under the waters of this bay by virtue of the grant in his patent, or as a riparian proprietor of the shore. It is well-settled law, with no respectable authority disputing it, that even where a person owns the soil by grant, and the waters of the sea or a navigable bay encroach

upon it, and it thereby becomes covered with navigable water, and a part of the sea or lake, until such waters recede or the land is otherwise reclaimed, and so long as it remains navigable, the public right to use it for purposes of navigation prevails. As long as it remains as it is, the people, the common public, have a right to navigate it. They can cross over it, and pass up and down it, and the plaintiff is powerless to stop them; and if the people have this right to pass over it, they have the right to take fish in its waters by hook and line, or in any other way common to all under the laws. They have the right to kill or capture ducks or other wild fowl resting or feeding upon its waters, or flying over it. They have the right to call such ducks or other wild fowl by all the devices known to sportsmen, and not prohibited by the general game laws, in the seasons not inhibited by such statutes, from the air, land, or lake, upon or over the waters of this bay as long as it shall remain such. If the plaintiff owns the soil by grant, he has the right, no doubt, to reclaim it by dikes or levees, but until he does so, the public have the right to use it, so long as its waters are navigable. Nor does the killing of game upon the premises of another, in my opinion, vest the property in such game in the land-owner, even though the person killing such game may be a trespasser."

The learned judge then quotes from the language of Mr. Justice Campbell, in *Marah v. Colby*, 53 Mich. 391, 51 Am. Rep. 116, to the effect that "such fishing as is done with lines from boats, even in narrow streams, cannot be complained of by riparian owners. The fish are, like any other animals, *feræ naturæ*, and, in this region, have always been regarded as open to capture by those who have a right to be where they are captured"; and he adds: "This language seems to settle the question of fishing, and must, by every legal analogy, apply to wild fowl as well as to fish and animals. Our laws also, as yet, have failed to give to or recognize in the riparian owner the absolute or exclusive right to shoot wild fowl upon navigable waters in front of his land. He can prevent any person from standing upon or occupying his land to shoot upon the waters; but where such person has a right to go with his boat upon the water, he has a right to pursue, either for the purposes of sport or for a livelihood, the wild fowl found upon the water, or winging their flight across it. With the right to kill or capture such wild fowl necessarily goes the right to use such means as may be most effective to accomplish such purpose, provided the captor keeps within the general laws of the state relating to the protection of game. He has the right to anchor his boat, and to fasten his decoys to the soil. It injures no right of the riparian proprietor, except the common right that he possesses with others of killing and capturing game where he can find it upon the water highways or public passages."

While the opinion of judges Campbell and Morse, that the public have the right to fish in the arms of the sea, the Great Lakes, and in rivers navigable in fact, seems to be sustained by the weight of authority, still, in the only case found in which the right to hunt upon a navigable river is adjudicated, an opposite view is expressed. In this case, the statute made it a misdemeanor to hunt upon lands where notice to the contrary had been posted. The owner's boundary was the center of a navigable river, and he had the necessary notice posted on his land. The defendant shot, from a boat on the river, flying birds while they were over that part of the river whose bed belonged to the complainant, and it was held that while defendant was not a trespasser because the river was a highway, still he was guilty and act: *State v. Shannon*, 36 Ohio St. 423; 38 Am. Rep. 599.

In delivering its opinion in that case, the court said: "It is claimed that this statute was not intended to protect lands covered by the waters of a navigable river. A majority of the court can see no grounds upon which lands covered by navigable streams should be excluded. They are as much the subject of private ownership as unnavigable streams. There is no distinction between them made by the terms of the statute. True, navigable streams in this state are declared to be public highways; but the right to use a public highway is not abridged by protecting the owner of the fee in the exclusive right of killing game therein. Travel and commerce are not thereby hindered. And as the power of the legislature to protect game, or the exclusive right of the owner of land to kill the same on his premises, is as ample over land covered by water, whether navigable or unnavigable, as it is over dry land, and as there is no attempt to distinguish between them in this statute, we must hold that all alike are within the protection of this statute." On this point, White, J., dissented.

As to the right to fish in the unnavigable fresh-water streams of this country, this belongs exclusively to the owner of the soil under such waters, to the exclusion of the public. Any one entering thereon for the purpose of fishing becomes a trespasser, and may be punished accordingly. Such is the rule, independent of any regulating legislation, and it applies with equal force to the small lakes and ponds throughout the country: *Cobb v. Davenport*, 32 N. J. L. 369; 33 Id. 223; 97 Am. Dec. 718; *Ingram v. Threadgill*, 3 Dev. 59; *Williams v. Buchanan*, 1 Ired. 535; 35 Am. Dec. 760; *Trustees etc. v. Strong*, 60 N. Y. 56; *Hooker v. Cummings*, 20 Johns. 90; 11 Am. Dec. 249; *People v. Platt*, 17 Johns. 195; 8 Am. Dec. 382; *Adams v. Pease*, 2 Conn. 481; *Waters v. Lilley*, 4 Pick. 145; 16 Am. Dec. 233; *Burroughs v. Whitman*, 59 Mich. 279; *State v. Roberts*, 59 N. H. 484-486; *Reynolds v. Commonwealth*, 93 Pa. St. 458.

CHIPPEWA LUMBER COMPANY v. TREMPER.

[75 MICHIGAN, 26.]

DEEDS—CONDITION SUBSEQUENT INSERTED FOR A MERETRIFICIOUS PURPOSE.

—A grantor in conveying land by deed has a right to insert, for an honest and beneficial purpose, a condition that the grantor, his heirs or assigns, shall not sell nor give away any intoxicating liquor upon the premises, and providing that upon violation of such condition, the land shall revert to the grantor, who shall at once take possession; but such condition will not be enforced when inserted for a dishonest purpose, and to enable the grantor to obtain a monopoly of the prohibited business.

EJECTMENT—CONDITION AGAINST SALE OF INTOXICATING LIQUOR—EVI-

DENCE—WAIVER.—In ejectment by a grantor to enforce a condition in a deed that the grantee should sell no intoxicating liquors on the premises, and upon a breach of the condition the land should revert to the grantor, the grantee may prove that the grantor's agent, with his knowledge, is engaged in the unlawful sale of liquor in the same village with the grantee, and from such proof the jury may infer that the grantor acquiesced in and consented to such sale, desiring to secure a monopoly in that business. This would be a perfect defense in ejectment, and the grantee would be justified in considering this a waiver of the condition in his

deed, which waiver he might act upon until notified to the contrary, and until then no forfeiture could be claimed for breach of condition in the deed.

Glidden and Bates, for the appellant.

M. Brown, for the plaintiff.

MORSE, J. The Chippewa Lumber Company platted the village of Chippewa Lake, in Mecosta County. They inserted in all their contracts and deeds of lots sold, the following clause: "This conveyance is made upon the express condition that the said party of the second part, his heirs and assigns or lessees, shall not, for the term of thirty years from [the date of the conveyance was here inserted], sell, give away, or dispose of, in any way whatsoever, upon said premises or any part thereof, intoxicating liquors or drinks of any kind whatsoever; and it is mutually covenanted and agreed between the said parties hereto, their heirs, successors, and assigns, that these conditions are for the benefit of the said party of the first part, its successors and assigns, and if the condition is not fully observed by the said party of the second part, his heirs, assigns, and lessees, the said party of the first part shall at once take possession of the premises above described, which revert to and belong to the party of the first part."

Harvey P. Wyman was the secretary, treasurer, and manager of the plaintiff corporation, and the person who procured the insertion of this clause in the conveyances, as he testifies, for the benefit of the corporation, as the company employed a large number of men there in the mills, and if saloons were permitted in the village, these men would "get tight," and would cause large expense and trouble in the management of the business of the company. He testified that he was the only member of the board of directors of the corporation who had any active part in the management of the business at Chippewa Lake.

April 25, 1885, the company deeded lot 2 of block 7, in said village, to Robert Gales. Gales subsequently conveyed the same premises to the defendant.

The plaintiff brought ejectment in the circuit court for the county of Mecosta, claiming a violation of the condition against selling intoxicating liquor, which was contained in the deed to Gales, and also in his conveyance to defendant, and had verdict and judgment in its favor. Evidence was given on the part of the plaintiff tending to show that defend-

ant kept a saloon and sold liquor upon the premises, being licensed to do so under the existing laws in this state.

This was not rebutted by the defendant, but in his defense he sought to show the following facts, looking, as he claimed, towards a waiver upon the part of the plaintiff of the condition of forfeiture in the deed:—

That the firm of H. P. Wyman & Co. was engaged in selling liquors in the village of Chippewa Lake; that intoxicating liquor was sold in their drug-store right along as a beverage; that the firm had been fined once for the sale of such liquor; that Wyman knew of such sales; that when one Dr. Clark was about to start another drug-store in the village, Wyman told him a second drug-store could not live; that such a store could not succeed without selling whisky; and that, although he could not keep Clark from opening a drug-store, he could and would prevent his selling liquor.

Wyman testified that the plaintiff corporation was not interested in the drug-store of H. P. Wyman & Co., but admitted that he was.

The court ruled out this proposed testimony, and submitted the case to the jury upon the simple proposition that if they found the defendant had sold intoxicating liquor, or given it away, on the premises, their verdict must be for the plaintiff.

The selling or giving away of intoxicating liquors in this state is a lawful business, if carried on in conformity to the statutes of this state governing the traffic in intoxicating drinks. It was not shown that the defendant had violated any law in the sale of liquor.

It does not seem to me that the Chippewa Lumber Company could, in the platting and sale of lots in the village of Chippewa Lake, so convey the lots as to grant for thirty years in effect a monopoly of the sale of liquor in themselves or any other person or persons. This would be contrary to public policy.

A jury would have the right to infer that the knowledge of H. P. Wyman that his firm was selling liquor in the village, and his participation in the same, was known to the plaintiff corporation, and consented to by it, since H. P. Wyman, one of the firm so selling intoxicating liquors, was the sole business manager of the plaintiff at Chippewa Lake, and holding two of its principal offices.

A jury would, from the facts offered to be shown, have been justified in finding that the plaintiff corporation was

willing that H. P. Wyman should sell liquor, not only lawfully, but unlawfully, in Chippewa Lake, and was determined that no one else should lawfully dispense intoxicating drinks; thus creating a monopoly in the business to said H. P. Wyman & Co.

I am satisfied that no forfeiture of lands under the condition in defendant's deed, or the deed to his grantor, ought to be permitted for any such purpose, and that the facts offered, if proved, would have been a perfect defense to this action.

The testimony was also admissible for another reason. The fact that Wyman & Co. were permitted to sell liquor without molestation, and with the assent, or implied consent, of plaintiff, would naturally be considered by the defendant as a waiver of the condition attached to the sale of lands in said village. And he would have a right to act upon such evidence of waiver until he received notice to the contrary.

He would not be obliged to presume that the corporation intended to create a monopoly in itself, or one of its members, to sell liquors, which monopoly the law would not permit; and under the circumstances as they naturally appeared to him, he could not be at once deprived of his land without notice. He was entitled to some claim or intimation on the part of the company that they intended to act differently towards him than towards others before he could be proceeded against in ejectment for a forfeiture under this condition against the sale of liquors.

I do not wish to be understood that the carrying on of a lawful business as a druggist, with no sales of liquor, except within the law, by the plaintiff or H. P. Wyman, would prevent an enforcement of the condition in the deed to defendant's grantor; but if it is shown that liquor has been sold unlawfully by H. P. Wyman & Co., as was proposed to be shown on the trial below, with the knowledge and consent of H. P. Wyman, the manager of plaintiff, at Chippewa Lake, while at the same time the said Wyman showed an intention to prevent, under the condition in the deeds to others, the sale of liquor by any one else in the village, whether such sale was lawful or unlawful, then the forfeiture of defendant's estate for a breach of this condition will not be permitted by the law, as it would be in restraint of trade, and the creation of a monopoly, and against public policy. It would then also appear that the alleged benefit of this condition to the company in preventing the sale of liquor to its mill-hands was not

the reason of the insertion of such condition, or for its enforcement, but that the condition was for the purpose of profit to the company or its manager in the exclusive sale of liquor in the village.

Neither do I think that the company, or H. P. Wyman, could open a saloon under the tax law, and enforce these conditions in the conveyances against all other persons, even if the sales of liquor in such saloon were kept strictly within the law.

I am well satisfied that it would be against public policy to permit the owner of a village plat to insert a condition in the conveyances of his lots that no bread should be sold upon the premises for thirty years, in order that he might himself have a monopoly in the village in the sale of bread.

Liquor is not a necessity, like bread, and is generally regarded as of damage to the general community; but I know of no good reason why a person should be permitted to have a monopoly in selling poison to a community any more than food, unless it be that no other person can be found fit to handle and dispense it. I do not believe, however, that any man or company should be permitted by the law, and aided by the courts, to create a monopoly in himself, either in the sale of bread or whisky.

The right to insert such a condition as the one in this case, for an honest and beneficial purpose, cannot be denied, and is within the public policy of this state: *Smith v. Barrie*, 56 Mich. 314; 56 Am. Rep. 391; *Watrous v. Allen*, 57 Mich. 362; 58 Am. Rep. 363.

But courts will not enforce such a condition inserted for a dishonest purpose, and to the end that the grantor may thereby obtain a monopoly in any business, and all others be restrained therefrom; and there can be no difference in this regard whether the business so sought to be centered in one person in a community is one acknowledged by every one to be of great benefit to mankind, or one regarded by many good people of detriment to the community, provided both are lawful; and certainly one cannot ask a court of justice to enforce such a condition as this against a person selling liquor otherwise lawfully, that he may reap the benefit of unlawful sales. Courts will not enforce forfeitures of estates for any such purposes.

The judgment of the court below must be reversed, and a new trial granted, with costs of this court to defendant.

DEEDS. — As to restrictions in a deed against the sale of intoxicating liquors: *Stutton v. Head*, 86 Ky. 156; 9 Am. St. Rep. 274, and note 276. A grantor has the right to insert a restriction in his deed against the sale of intoxicating liquors, when he is acting honestly and with a good purpose in view: *Smith v. Barrie*, 56 Mich. 314; 56 Am. Rep. 391; *Watrous v. Allen*, 57 Mich. 363; 58 Am. Rep. 363.

MOONEY v. DAVIS.

[75 MICHIGAN, 188.]

EVIDENCE. — COPIES OF STATEMENTS MADE TO A COMMERCIAL AGENCY by a merchant as to his financial standing, taken in writing at the time, and shown to have been afterwards approved by him, are admissible in evidence in favor of creditors who have relied upon such statements, and claim them to be fraudulent and false.

FRAUDULENT SALE. — STATEMENT TO COMMERCIAL AGENCY. — If, after a merchant has made a statement to a commercial agency as to his financial condition, there is a change for the worse therein, it is his duty to notify such agency, that parties with whom he has commercial dealings may not be misled as to the extent of credit they may safely give; otherwise, the merchant is bound by his statement.

EVIDENCE. — STATEMENTS TAKEN FROM ACCOUNT-BOOKS, themselves in evidence without objection, are admissible, in connection with such books, to show the financial state of their owner's business at a certain date.

FRAUDULENT SALE. — WHERE DEFENDANT IS PRESENT, and at liberty, by his testimony, to refute the principal facts, if false, upon which a claim of fraudulent sale is based, his failure to so testify is a fact patent to the jury, and which plaintiff is entitled to in his favor in the instructions.

FRAUDULENT SALE. — CONCEALMENT OR MISREPRESENTATION of a merchant as to his financial condition need not be willful nor intended in order to constitute a fraud which will vitiate a sale made to him, if such misrepresentations are relied upon. It is sufficient if they have the effect to defraud.

FRAUDULENT SALE. — QUESTION FOR JURY. — Where a creditor has relied upon the statements of a merchant as to his financial condition in selling him goods, the question as to whether such representations were false, and therefore a fraud, is to be determined by the jury from all the facts in the case.

Corliss, Andrus, and Leste, for the appellants.

Bowen, Douglas, and Whiting, for the plaintiffs.

SHERWOOD, C. J. Until March 10, 1886, the defendants did business in Detroit, as Dudley, Davis, & Co. They were engaged in the wholesale leather and findings business. On that day, Dudley succeeded this company, and took its business as such successor, and, under the name of the Standard

Leather Company, carried it on until January 7, 1888, when he made a general assignment to his former partner, E. J. Davis.

The plaintiffs were engaged in the tanning and harness-leather business at Columbus, Indiana, in August, 1887. Mooney & Co. received an order from Dudley in July previous for some leather, and on making inquiry at Dun & Co.'s agency for the financial standing of Dudley, and upon the plaintiffs receiving a favorable report, upon which they relied, they filled said order on the 5th of August. It is claimed, and the undisputed testimony shows, that the report made by Dun & Co. was based upon the verbal statement of Dudley to Dun & Co.'s agent, from which the rating was made, and which was made in March, 1886, and was to the effect that the defendant's assets then amounted to \$39,882, and a mortgage indebtedness upon the real estate of \$3,500.

The second sale and shipment of leather was September 9, 1887. In this month, the plaintiffs obtained a statement from the agency, and received the same report as in July as to Dudley's financial condition; and it is claimed that it was upon this last report the second shipment was made. Both of these bills were paid for, and none of the goods purchased upon these sales are now claimed for.

In December, 1887, Dudley wished to buy more leather, and, at this time, plaintiffs consulted Bradstreet's agency as to his financial standing, and obtained a special report, and on this, together with what they had learned through Dun & Co.'s agency, plaintiffs, on the 12th of the month, sold to Dudley, as they claim, the third bill of goods, amounting to \$411.86; and these goods are those for which the present suit is brought in replevin. Dudley's schedules to his assignment showed his assets at the date of that instrument to be \$6,377.99, and his liabilities, \$9,959.46.

This suit was commenced immediately after the assignment became known to the plaintiffs, to recover the goods sold in December, 1887, who claim that the fraudulent representations made by Dudley as to the credit of himself are sufficient to vitiate the sale of this bill of goods, and to entitle them to a return of their property.

Mooney testified that in making the sale to Dudley, his firm made inquiries of Dun's and Bradstreet's agencies, and that in making the last sale, they relied upon the reports obtained from them; and the agencies averred that their source of

information upon the subject was obtained from Dudley, in the statements he gave to their agents.

The plaintiffs were subscribers to the commercial agency of R. G. Dun & Co., and the statements made by Dudley to Dun's agent as to the amount of defendant's property are not denied by any one. In the testimony of Bradstreet's agent, he says he had a personal interview with Dudley as late as June 17, 1887, in which the latter referred to the statements made to both agencies in March, 1886, and said that there was no material change in the defendant's financial condition from the report then made, and the defendant's rating at that time was from twenty-five thousand to thirty thousand dollars, and his showing was that he had a surplus of over thirty-six thousand dollars.

The books of the defendant were offered in evidence, from which testimony it would appear that Dudley was insolvent at the time the goods in question were purchased.

The defendants offered no testimony upon the trial, and the plaintiffs obtained judgment for the property, with one dollar damages.

The defendants bring the case into this court, and ask for a reversal of the judgment, assigning twenty-two alleged errors as grounds therefor.

The principal question in the case is, Were the goods in question obtained by the false representations and fraud claimed by plaintiffs?

No question is made upon the pleadings; and if the defendant Dudley committed the fraud in question in making the purchase, the title to the goods never passed, and the suit was well brought. There was testimony given by the plaintiffs tending to show the misrepresentation and fraud alleged, and the jury have found for the plaintiffs, and it only remains to be seen whether the testimony by which the fraud of the defendant was made to appear was competent, and properly admitted.

It is claimed by defendants that the court erred in admitting copies of the statements of the financial condition and ratings of Dudley made by the agents of Dun & Co. and Bradstreet. We find nothing objectionable in this. It must be recollected that these statements were made by these agents as given verbally by Dudley. They were only statements given by these men of what Dudley told them, and written down at the time. The copies offered are of the same kind of evidence as those

made at first, but of a different grade. Either was admissible. Neither was ever signed by the defendant, and but for the testimony subsequently given tending to show his approval of the same, neither would have been admissible.

We further think the testimony tending to show defendant Dudley's approval of these statements was so recent before the sale in question that he must be held bound thereby, or at least, if there had been any material change in his financial standing after the statements were given, he should have notified the agencies to whom the information was given, that persons with whom he had commercial dealings should not be misled as to the extent of the credit they might safely give.

These agencies have become almost a necessity in the transaction of commercial business, and the rules by which they are governed, and the information they gather and impart, are well known to business and commercial men generally, and such information is perhaps more frequently relied upon among such men than that obtained from all other sources, and courts cannot shut their eyes to these facts; and the changes in Dudley's business relations we do not think were such as to affect the question now under consideration. The responsibility and the amount of assets over liabilities available for business purposes, or from which money could be realized for the exigencies of business, were the important questions presented to the creditors, and upon which they made sale of their property.

We think the views here expressed are fully supported by the authorities cited by counsel in their briefs upon both sides, and they need not be herein more definitely referred to.

We see no objection to the use made of the statements taken from the books of Dudley, so long as the books themselves were in evidence, and the record informs us that they were, and without objection. Dudley was in court, and was made to attend upon a subpoena by the plaintiffs, but neither party examined him. In the court's charge to the jury he said, among other things: "Mr. Dudley has been in court during this trial. He knows all about the facts, and he knows whether he has made these representations to the reporters of these agencies or not. He has not deemed it proper to go upon the stand and contradict that in any way, and has remained silent during this trial. That may be considered by you as one of the facts in this case, as to whether the position of the plaintiffs is in accordance with the facts."

The court committed no error in this charge. The fact that the defendant was at the trial, and was at liberty, by his own testimony, to refute the principal facts, if untrue, upon which the fraud was claimed, and did not do so, was a fact patent to the jury, and was not without some effect, and the plaintiffs were entitled to the circumstance in their favor, and this was in substance the charge of the court upon this point.

The defendants' counsel presented the following requests, all of which were refused:—

"1. The plaintiffs, in order to recover in this case, must prove that fraud existed on the twelfth day of December, 1887, when this purchase was made, either by willful concealment or misrepresentations of facts by Mr. Dudley, and unless the plaintiffs have established one of such facts, they cannot recover.

"2. The defendant E. J. Davis, assignee, is entitled to recover in this case for the value of the goods replevied, \$318.08, with interest since January 14, 1888, at six per cent, unless you find that the goods were purchased by Dudley December 12, 1887, with intent to defraud the plaintiffs.

"3. Even if you should find from the facts that Dudley was in fact insolvent December 12, 1887, when the goods were purchased, that would not be sufficient for plaintiffs to recover, unless you also find that Dudley knew it, and made the purchase knowing that he could not pay for them, and with intent to defraud plaintiffs."

The court did right in refusing these requests.

As regards the first, neither the concealment nor misrepresentation need be willful or intended in order to constitute the fraud which will vitiate the contract. It is sufficient if they have the effect to defraud.

The second and third requests have each the like infirmity.

Counsel for defendants, at the close of the charge, asked the court orally to charge that "if they find intent to defraud on the part of Dudley, they must find it existed at the time of the purchase of December 12th."

Instead of so charging, the court said to the jury: "As to that, gentlemen of the jury, if you believe, from the evidence in this case, that Mr. Dudley represented himself in March, 1886, to be worth thirty-six thousand or thirty-seven thousand dollars over and above his liabilities, and permitted that statement to remain upon the books, and these commercial agencies reported that statement, as it is claimed on behalf of the plain-

tiffs, down to September, 1887, and these were made, and sales were made by the plaintiffs in December, and the representations as to his financial condition were untrue, you may infer from that the intent on the tenth day of December, 1887, that he purchased the goods not intending to pay for them, and that they were purchased under said fraudulent representations as avoided the contract."

Counsel for defendants, Mr. Corliss, then asked the court to further charge the jury that they cannot assume that the representations made were false, or that any statements that were made were false, except upon positive proof. The court then said further to the jury: "You may take into consideration the facts in determining that, and you may consider it, gentlemen; you may take into consideration the fact that in September, 1887, as claimed by the plaintiffs, the financial condition of Mr. Dudley was represented to them as being the same as it was a few months preceding, — that he had thirty-seven thousand dollars over and above his debts and liabilities. Take into consideration the fact that on the seventh day of January, 1888, he failed for several thousand dollars over and above his assets. Take into consideration his financial condition as reported to the commercial world in September as being as I have stated, and that on the fourteenth day of January, 1888, he failed, showing the liabilities of three thousand or four thousand dollars over and above his assets; and there being no explanation from Mr. Dudley as to what has become of his capital of thirty-six thousand dollars from September to January, you are justified, if you believe that evidence, to find that the defendant was guilty of fraud when he ordered these goods on the twelfth day of December, 1887."

These last refusals and charges were excepted to by defendants' counsel. They were not much argued at the hearing, and not at all in brief of appellant, and we will only say we see nothing in them seriously objectionable, when taken in connection with the other portions of the charge.

We do not think the testimony given by Mr. Foster, nor what the court said while said witness was upon the stand in relation thereto, as to what the testimony did not show as to Dudley's continuing in business, of a character to prejudice the interests of either party, and the exception relating thereto is not well taken.

No error appearing in the record, the judgment will be affirmed.

MORSE, J., dissented. In his opinion, Dudley was under no obligation to notify the commercial agency of the changes which occurred in his financial ability, nor that he had reached the verge of bankruptcy, and was unable to pay his debts. The judge also thought the trial court erred in receiving in evidence the copy of the report made in 1886 from the books of Dun & Co., because it was not proved that the verbal statements made by Dudley to their agent had been correctly copied into such books.

FRAUD. — The existence or non-existence of fraud is ordinarily a question to be determined by a jury: *Cover v. Manaway*, 115 Pa. St. 338; 2 Am. St. Rep. 552; *Weaver v. Lapsley*, 42 Ala. 601; 94 Am. Dec. 671; *Drinkard v. Ingram*, 21 Tex. 650; 73 Am. Dec. 250; *Burch v. Smith*, 15 Tex. 219; 65 Am. Dec. 154; *Linn v. Wright*, 18 Tex. 317; 70 Am. Dec. 282; *Ellis v. Matthews*, 19 Tex. 390; 70 Am. Dec. 353; *Filley v. Register*, 4 Minn. 391; 77 Am. Dec. 522; *Kuykendall v. McDonald*, 15 Mo. 416; 57 Am. Dec. 212; *Briscoe v. Bronaugh*, 1 Tex. 326; 46 Am. Dec. 108; *Billings v. Billings*, 2 Cal. 107; 56 Am. Dec. 319; *Dodd v. McCraw*, 8 Ark. 83; 46 Am. Dec. 301; *Anderson v. Burnett*, 5 How. (Miss.) 165; 35 Am. Dec. 425; *McMichael v. McDermott*, 17 Pa. St. 353; 55 Am. Dec. 560; *Garland v. Chambers*, 11 Smodes & M. 337; 49 Am. Dec. 63; *Forsyth v. Matthews*, 14 Pa. St. 100; 53 Am. Dec. 522; the existence of a fraudulent intent in the transfer of property is a question for the jury, not for the court, to decide: *Morgan v. Hecker*, 74 Cal. 540; *Hamilton v. Ross*, 23 Neb. 630.

FRAUD MAY BE INFERRED FROM CIRCUMSTANCES AND FACTS, especially when the circumstances and facts lead a reasonable man to the conclusion that an attempt has been made to withdraw a debtor's property from the reach of his creditors to prevent their recovery of just debts: *Burt v. Timmons*, 20 W. Va. 441; 6 Am. St. Rep. 664; *Boyle v. Maroney*, 73 Iowa, 70; 5 Am. St. Rep. 657; *Rothell v. Grimes*, 22 Neb. 526.

FRAUD — STATEMENTS TO A MERCANTILE AGENCY. — In determining the question of fraud on the part of purchasers of goods, their prior statements, made to a commercial agency with intent that such statements should be communicated to persons making inquiries of such agency, may be taken into consideration: *Eaton v. Avery*, 83 N. Y. 31; 38 Am. Rep. 369.

FRAUD — WHAT REPRESENTATIONS ARE FRAUDULENT: *Heater v. East*, 125 Pa. St. 52; 11 Am. St. Rep. 874, and particularly cases in note 879; *Finlayson v. Finlayson*, 17 Or. 347; 11 Am. St. Rep. 836; *Lewark v. Carter*, 117 Ind. 206; 10 Am. St. Rep. 40, and note 45. The mere expression of opinion, to be fraudulent, must be made by one knowing it to be false, and with intent to deceive: *Moses v. Katzenberger*, 84 Ala. 95. A representation, if a falsehood, and acted upon by one deceived thereby, is always fraudulent: *Labbe v. Corbett*, 69 Tex. 503. There must exist fraudulent intent in order to vitiate a sale or conveyance for fraud: *Dalton v. Thurston*, 15 R. I. 418; *Campbell v. Holland*, 22 Neb. 587; and a promise without intent to perform is a fraud: *Newman v. Smith*, 77 Cal. 22. Fraudulent representations must be as to material matters: *Id.*; compare *Chatham F. Co. v. Moffatt*, 147 Mass. 403; 9 Am. St. Rep. 727, and note 730. And one may, under certain circumstances, be responsible for representations made in the sale of land, although he honestly believed the representations true, and had no intention of deceiving or defrauding the other party: *Davis v. Nuzum*, 72 Wis. 439. Fraud may consist in concealing material facts, as well as making false representations with respect thereto: *Kraft v. Baister*, 38 Kan. 352.

AMPERSE v. CITY OF KALAMAZOO.

[75 MICHIGAN, 228.]

MUNICIPAL CORPORATIONS. — CITY IS NOT LIABLE IN DAMAGES for the willful refusal of its common council to approve a statutory liquor bond, in the absence of a valid contract creating, or a statute declaring, a liability therefor.

O. T. Tuthill, for the appellant.

E. S. Roos and William G. Howard, for the defendant.

LONG, J. This cause came on to be heard in the circuit court for the county of Kalamazoo, without a jury, and the court, having heard the offer of proof made by the plaintiff, directed judgment to be entered in favor of defendant.

Plaintiff brings the case here by writ of error.

The plaintiff offered proofs tending to show that the plaintiff, the wife of Marenus Amperse, resided at the city of Kalamazoo, and was desirous of engaging in the business of the sale of spirituous and malt liquors at retail in the grocery store occupied by her husband in said city.

That she is of the age of forty years and upwards; and on or about May 20, 1885, she presented a bond in conformity with the requirements of the statute, with two sufficient sureties, in the sum of three thousand dollars,—that being the sum fixed as the penalty of such bonds by the common council of said city.

That the bond took its regular reference to the committee on license, and at the regular meeting of the council, on the 25th of that month, the committee reported thereon as being a good bond financially, but made no recommendation upon it; that at that time the mayor of said city stated that there were certain petitions on file against granting a license to the plaintiff and her husband to carry on the business of retailing spirituous and malt liquors.

That by request of one of the members of the council the city attorney was asked to state his opinion as to the matter of the petitions, and the right of the plaintiff to have granted to her a license and the approval of the bond, at which the city attorney stated to the council that the statute made no distinction between individuals; that any person who could present the requisite bond was entitled under the law to have his bond approved by the council, and licensed thereby to engage in the sale of liquors; and that the council acting

fairly under the law and upon the report of the committee that the bond was found to be good in all respects, and there being no objection to the sureties, their financial responsibility and efficiency, they were bound to approve it.

That, on being interrogated by a member of the council what would be the consequences if they did not, he answered that it was at the risk of a possible legal remedy to the petitioner, or any applicant, by an action on the case against the members of the council individually for a willful refusal to perform their duty in approving said bond reported upon by the committee to be good and without any objection.

That thereupon George Winslow, a member of the council, made the following motion: "Alderman Winslow moved that the bond of the petitioner be disallowed; that, if the instructions of the city attorney was law, he wanted to be put on record as going against the law, and taking the chances in disapproving said bond; that the petitions on file against granting your petitioner a license and approving her bond, for the reasons stated, were enough for him, and that the council ought to be governed thereby; that the petitions ought to be respected, and control the action of the council in this case. The motion then having been made by Alderman Winslow, and seconded, being put to a vote, the council voted that the bond be disapproved."

That the petitions referred to against the approval of the bond state that plaintiff and her husband kept a disorderly house in the past year, and that the sale of liquor in that neighborhood is dangerous to real estate; and the council, when acting in disapproving said bond, stated in its session that the reasons set forth in such petitions were its reasons for disapproving the bond, and made no pretense of any other reason or cause.

That at a meeting of the council held on June 1st thereafter, the plaintiff, by her attorney, appeared before it, and asked the council to give its reasons for disapproving the bond, and if there was any other objection than the matter of such petitions, to state the same, so there would be no mistake as to the cause of rejecting of said bond, and again asked the council to approve the same, and again presenting the said bond to the council; whereupon the council refused to approve the same, or make any further objection thereto.

Counsel for plaintiff further offered to show that the matter set forth in the petitions, that plaintiff and husband kept a

disorderly place, was what governed the council in disapproving the bond, and that it was not on account of any defect in the bond, or the insufficiency of the sureties thereon; and that the plaintiff was ready, upon the approval of the bond, to pay the tax required by the statute to the city treasurer to enable her to carry on the business.

That upon such refusal of the council to approve the bond, a petition was made by the plaintiff to the supreme court for a *mandamus*, and on June 8th an order was made by said court to the common council to show cause why the writ should not issue, which was served on the mayor of the city on June 9th; that thereafter no action was taken by the council until August 19th, when the committee again reported without recommendation, and the bond was again disapproved; that at the October term of the supreme court the cause on the petition for *mandamus* was argued, and in the January term, 1886, of that court, a decision was rendered granting a peremptory *mandamus* upon the council for the approval of the bond, and on January 20, 1886, the bond which had been presented by the plaintiff on May 20, 1885, was approved by the action of the council, and the tax was paid a few days thereafter to the city treasurer.

That from the twentieth day of May, 1885, when the bond was presented for approval and the license asked, a period of nine months and over, the plaintiff was deprived from carrying on any business, and the tax which was paid from that time, amounting to about \$150, was lost; that during that time the plaintiff would have in the business received from the sale of spirituous liquors, for whisky, in profits, \$80 a barrel, the sum of \$960, about 250 kegs of beer, at \$2.50 a keg profit, and other spirituous liquors, such as brandy, wine, and gin, a profit of about \$80, and the costs of the proceedings had in the course of the *mandamus*, which would have been in the sum of about \$2,000.

Upon this offer of proof being made, the court asked plaintiff's counsel if he claimed that the records of the council show that the bond was disapproved because the plaintiff kept a disorderly house. To this inquiry counsel stated: "The records show nothing to show that it was disapproved for that reason. I offer this return, made by the city attorney to the city council, for the purpose of showing their reasons for refusing it."

The court then asked counsel: "You claim that outside of

the records you are entitled to show what was said?" To which counsel responded: "I claim we have the right to show all that was said and all that was done by the council in the disapproval of this bond, — the reasons they gave for it."

From an inspection of the return made by the council to the order to show cause, which plaintiff's counsel put in evidence, it appears that when the bond was presented to the council it was referred to the committee on license, by whom it was referred back to the council without recommendation; the committee stating, in referring it back, that they had no recommendation to make. This report was adopted, and Mr. Ihling, a member of the council, offered the following resolution, which was unanimously adopted: "Moved that the liquor bond of Catharine Amperse be disapproved."

And in this return the council say that this embraces its entire action in regard to the liquor bond of the plaintiff. The proofs tendered by plaintiff's council of the action of the common council or any of its members, aside from this action as stated in such return, were not, therefore, matters of record; but counsel claimed the right to supplement the record by parol proofs showing just what was said and done by the council and its several members at its meetings, as well as the advice given there by the city attorney.

The foregoing is substantially all that was claimed by counsel for plaintiff, as making a cause of action, and upon which he claimed a right of recovery against the city.

Even if such parol proofs were competent to supplement the record of the council, it would not constitute a cause of action against the city. A municipal corporation cannot be made liable in any such action. Municipal officers are in no such sense municipal agents that their negligence is the negligence of the municipality. The city cannot be made to respond in damages for the torts of its officers, even if such wrongs could be redressed against the officers themselves.

It is true, if the act which is done by a municipal corporation would be tortious if done by a natural person, the corporation is held liable for it to the same extent and for the same reason, but no such body can be made responsible for official neglect involving no active misfeasance. It is only where corporations have been guilty of some positive mischief, produced by active misconduct, that they have been held liable, unless there be a valid contract creating, or a statute declaring, the liability. Here the complaint is of a wrong

done the plaintiff, not by an act of the council, but by its refusal to act,—its refusal to approve the bond. No active misfeasance is charged, but a willful neglect of duty.

It cannot matter, so far as the liability of the city is concerned, whether the neglect was willful or otherwise. There is no common-law liability, and there is no statute in this state which creates any.

Judge Dillon, in his work on municipal corporations, section 754, lays down the rule that a municipal corporation is not responsible for an omission or refusal to enact ordinances or by-laws, in the absence of a valid contract creating, or a statute declaring, a liability therefor, nor if it enacts them is it liable for damages arising from a neglect to enforce them. In *City of Detroit v. Blakeby*, 21 Mich. 113, 4 Am. Rep. 450, it was said by this court: "It has been uniformly held . . . that public officers, whose offices are created by act of the legislature, are in no sense municipal agents, and that their neglect is not to be regarded as the neglect of the municipality, and their misconduct is not chargeable against it, unless it is authorized or ratified expressly or by implication."

This same principle was recognized in *McCutcheon v. Homer*, 43 Mich. 483; 38 Am. Rep. 212.

This rule is sustained by the decisions of the courts of the several states wherever the question has arisen.

The court was correct, under the circumstances, in directing judgment for defendant.

The judgment of the court below must be affirmed, with costs.

THE PLAINTIFF IN THE PRINCIPAL CASE having failed to recover damages for the non-approval of her bond in her action against the city, brought an action entitled *Amperse v. Winslow*, reported in 75 Mich. 234, and in which, upon the facts set forth in the principal case, she sought to hold an individual member of the city council civilly liable in damages for willful misconduct in disapproving such liquor bond. She claimed that the duty of defendant, as alderman, was ministerial, and not judicial, under the facts; that all the judicial duties relative to the approval of the bond, its sufficiency, the sufficiency, residence, and character of the sureties, had already been passed upon by the committee reporting favorably upon the bond to the council; that it then became the duty of defendant to vote for its approval, and his voting otherwise was evidence of willful misconduct; that when the committee acted favorably upon the bond, reporting it sufficient in amount, with satisfactory sureties, these matters passed into judgment, not subject to criticism or review by defendant or any member of the council; that all matters requiring investigation, discretion, and judgment in regard to the amount and form of the bond, the number and character of the sureties, and other

requisites and essential elements required of them, had been determined by the committee for the council and defendant, and that there was only left to them and to him the ministerial duty of approving the bond, which was refused; that after the report of the committee, stating that the bond was in proper form, and the sureties financially responsible, and instructions received from the city attorney that it was the duty of the council to approve it, then each alderman was obliged to approve it by his vote, and refusal or failure so to do was a willful violation of duty, for which an action for damages would lie; that defendant acted willfully and maliciously, and in disregard of his duty, in refusing to vote for, and to influence the other aldermen to vote for, the approval of the bond, after the favorable report of the committee and the instructions by the city attorney. The court, however, held that, admitting the facts to be as stated in the principal case, still no civil action for damages could lie against defendant, for the reasons that he or any other officer charged by statute with the duty of approving or disapproving such liquor bonds acts judicially, and cannot be held so liable, no matter how erroneous his determination may be; that such officer is not precluded from investigating for himself by the favorable report of the committee on the bond, and when it is put upon its passage after such report, it is not only his right, but his duty, to disapprove it by his vote, if not satisfied that it meets the statutory requirements; that it is the duty of such officer to see that such bonds, and the affidavits of the sureties thereon, meet all the statutory requirements, and that the penalty is fixed by the body of which such officer is a member, and if in his judgment each surety is not worth such sum over the statutory deductions, it is his duty to disapprove the bond. The declaration does not allege, nor is it shown, that if defendant had voted for the approval of the bond, and had used his influence with the other members of the council thereto, that the bond would have been approved. As it is not alleged nor shown that any member of the council voted to approve it, the implication is, that the whole council voted against it. So that if defendant had voted for approval, and done his duty as claimed, it would have made no difference in the result as to the injury sustained by plaintiff. Though defendant may have been acting in a ministerial capacity, and have willfully violated his plain duty, still no cause of action would arise upon which damages could be based, if plaintiff was not injured by such willful misconduct; and what defendant's motive was in voting for the disapproval of the bond would not aid plaintiff's case. In any view of the case, the action for damages is not maintainable.

MUNICIPAL CORPORATIONS ARE NOT LIABLE IN DAMAGES for a non-exercise of, or for the manner in which, in good faith, it exercises discretionary powers of a public or legislative character: *McDade v. Chester City*, 117 Pa. St. 414; 2 Am. St. Rep. 681, and note 686; *Dooley v. Town of Sullivan*, 112 Ind. 451; 2 Am. St. Rep. 209, and note 212; *Wright v. City Council of Augusta*, 78 Ga. 241; 6 Am. St. Rep. 256, and note 259; *Stackhouse v. Lafayette*, 26 Ind. 17; 39 Am. Dec. 450, and note; nor is a city liable for a failure to enact or enforce proper ordinances: *Wheeler v. City of Plymouth*, 116 Ind. 158; 9 Am. St. Rep. 337. Municipal corporations are not liable for a failure to exercise legislative or judicial powers, nor for a negligent exercise of such powers, but only where it negligently performs or fails to perform a ministerial duty imposed by law: *City of Anderson v. East*, 117 Ind. 126; 10 Am. St. Rep. 35; *Miller v. City of St. Paul*, 38 Minn. 134; *Chope v. City of Eureka*, 78 Cal. 588; 12 Am. St. Rep. 113, and note.

BROWN v. BUCK.

[75 MICHIGAN, 274.]

MANDAMUS IS PROPER REMEDY to compel an original hearing in a chancery suit.

CONSTITUTIONAL LAW—JURY TRIAL IN EQUITY CASES.—The Michigan statute of 1887, providing for a final decision of questions of fact in equity proceedings by the verdict of a jury, and for the rejection of testimony by the judge, as in suits at law, is unconstitutional.

CONSTITUTIONAL LAW.—The legislature cannot deprive the supreme court of its revisory jurisdiction over all the other state tribunals.

LAWS PASSED FOR ONE PURPOSE, and under one title or category, cannot be made to do duty, under a foreign enactment, which was not in any way within their contemplated range.

TRIAL BY JURY IN COMMON-LAW CASES is guarded by a large number of provisions designed to procure a fair and impartial trial, extending from the jury-lists through the process of selecting and summoning regular jurors and talesmen to the completion of the panel through challenges and other tests. All the provisions, whether statutory or not, belong to the machinery devised for the common-law courts, and cannot be adopted without new and careful legislation to chancery practice.

CHANCERY PRACTICE.—When any matter becomes involved in a chancery suit, the necessities of justice and equity require that all persons and all things concerned in the controversy shall be brought before the court to have their respective interests charged or protected, and to end the controversy finally.

COMMON-LAW PRACTICE.—When a case is tried by a common-law jury, one verdict settles the whole issue, and, unless set aside, furnishes the complete basis of judgment, which cannot in anything depart from it, and there is, and can be, no issue which the jury do not dispose of.

CONSTITUTIONAL LAW—REMEDIES.—The legislature may change the formalities of legal procedure, but it cannot make changes so as to impair the enforcement of rights.

EQUITY.—FUNCTIONS OF JUDGES in equity cases are as well settled a part of the judicial power, and as necessary to its administration, as the functions of juries in common-law cases.

EQUITY.—RIGHT TO HAVE EQUITY CASES dealt with by equitable methods is as sacred as the right of trial by jury.

EQUITY.—WHATEVER MACHINERY BE USED for gathering testimony or enforcing decrees, the facts and law must be decided together in equity cases; and when the chancellor desires the aid of a jury to find out how facts appear to such unprofessional men, it can be done only by submitting single issues of fact, and the jury cannot foreclose him in his conclusion unless his judgment is convinced.

EQUITY.—SYSTEM OF CHANCERY JURISPRUDENCE has been developed as carefully and judiciously as any part of the legal system, and the judicial power includes and always must include it.

CONSTITUTIONAL LAW—JUDGES, STATUTE LIMITING POWERS OF.—Any statutory change which transfers the power which belongs to a judge to a jury, or to any other person or body, is unconstitutional.

EQUITY—CONSTITUTIONAL LAW.—Cognizance of equitable questions belongs to the judiciary as part of the judicial power, and under the Michigan constitution must remain vested with them.

Dallas Boudeman, for the relator.

Hawes and Luby, for the respondent.

CAMPBELL, J. Relator represents that in April, 1888, a bill in chancery was filed in Kalamazoo County by Sarah E. Field, to set aside a deed made to relator by Thomas B. Lord, who was father of both parties, upon the grounds generally set up in such cases, of fraud, undue influence, and incapacity. Issue being joined, the complainant made claim under the statute of 1887 for a trial by jury. This demand was allowed, and certain issues were submitted, which to some extent covered the charges, but not in a very tangible way, and the jury gave answers to the specific questions. The circuit judge, acting entirely on these answers, made a decree in favor of complainant, canceling the deed, and refused to exercise his own judgment in the case. A *mandamus* is asked to require him to set aside the decree, and to hear the cause and decide it himself.

It is due to the circuit judge to say that he took this course to enable the validity of the statute to be passed upon in this court, inasmuch as this question has been raised in several parts of the state, and needs to be settled in order to procure uniformity of practice.

A preliminary objection was made to the use of the process of *mandamus* to determine the dispute, which it is insisted should come up by appeal. But there is no force in the objection. We are informed by the return that the circuit judge never passed upon the questions of fact himself. An appeal would, therefore, in some circumstances, and in one view of the case, require us to act as a tribunal of original powers, and not by way of review, which, in equity cases, is not in our province. It might, also, and probably would, require us either to decide on a partial state of facts, or remand the cause for rehearing, which is not contemplated in chancery appeals. If the circuit judge was wrong in the theory on which he thought it his duty to act, the case has never been heard at all in any legal way. The *mandamus* is not asked as a means of reviewing the merits, but only to compel an original hearing. For this purpose it is a proper remedy.

The statutory provision now in controversy consists of a recasting of a section of the old compiled laws, intended to give an opportunity of trial in open court, if the court deem it proper, and providing means in such case for securing a record of the testimony to be used on appeal. This section

which was originally section 3511 of the compilation of 1857, went through a number of changes before it became section 5093 of the compilation of 1871, and after several more changes appears as section 6647 of Howell's Statutes. Some confusion has existed because, by introducing so many forms of one section, it has not always been easy to construe it in connection with the whole chapter on courts of chancery, but they have, by practical construction, been fairly harmonized. In 1887 this section was sought to be radically changed by converting a chancery hearing to something meant to resemble a trial at law, but confining this change mostly to jury trials, and not putting hearings without a jury on the footing of common-law trials without a jury. As this is the only section altered, and it is but part of a full system matured and simplified by the experience of considerably more than half a century, it is brought to our attention under two points of view: 1. As claimed to be so imperfect and incongruous as to be void for its deficiencies; 2. As invalid on broader constitutional grounds.

The former of these two questions seems proper to be glanced at first; and it makes it desirable to refer somewhat to the growth of the system.

As Michigan had a long territorial experience, its judicial system naturally became fashioned in close analogy to that of the United States, and so recognized and perpetuated in their essentials the classification of legal and equitable rights as involving the necessity of separate administration in important particulars. The constitution of the United States recognized the division of ordinary civil jurisprudence into cases at law and cases in equity, and it has been held by the supreme court of the United States that this recognition puts it beyond the power of Congress to make any serious change in that classification. In *Carpentier v. Montgomery*, 13 Wall. 480, the importance of the distinction, and the impracticability of disregarding it, was somewhat explained in such a case as is now under consideration, as in several previous cases it had been held that the policy enjoined by Congress of securing as far as possible uniformity of practice between the state and United States courts could not be carried so far as to confound the legal and equitable jurisdictions: *United States v. Howland*, 4 Wheat. 115; *Boyle v. Zacharie*, 6 Pet. 658; *Robinson v. Campbell*, 3 Wheat. 222; *Livingston v. Story*, 9 Pet. 654; *Russell v. Southard*, 12 How. 139; *Neves v. Scott*, 13 Id. 268;

Boyce's Ex'rs v. Grundy, 3 Pet. 210; *Bodley v. Taylor*, 5 Cranch, 191. These and many other cases which might be cited show the general course of decision in the supreme court.

As Michigan received the common law free from any older statutory admixture, it naturally followed the English divisions of law and equity, and under the enlightened administration of chancellors Farnsworth and Manning, the practice, which was largely shaped by legislation in accordance with their views, received the form which it now has, and our statutes embody in a very intelligible way a system so complete as to need very little aid from other sources.

So far as the statutes provide for the earlier stages of a cause, up to the preparation for hearing, this new statute does not interfere, except as to testimony, in which the change is radical, as it is also radical in regard to the mode and incident of the hearing and the preparations for appeal. And here occurs a series of difficulties requiring attention. As the law stood before, the testimony might be taken by deposition or in open court, and upon specific issues of fact suitable for a jury, the aid of a jury might be invoked. But in all cases the testimony was secured and preserved for use on appeal, and in this court each case was to be reheard on the whole testimony, and on that rehearing this court was enabled and required to render its own decree, by simple affirmance if the decree below was satisfactory, and in other cases by such a change, partial or total, as would make the final disposition such as it should have been in the first place. But in all cases where the cause had proceeded to a hearing on facts, the law contemplated that this court should make a final disposition on the merits, and not remand it for a new trial or hearing on issues already once tried and decided. The sections of the statute which refer to the action of this court in appellate cases remain unchanged, and are the only statutory method of bringing into this court chancery appeals. As it is not competent for the legislature to deprive the supreme court of its revisory jurisdiction over all the other state tribunals, no legislation which practically destroys it is valid.

The statute of 1887 (Laws of 1887, p. 358) undertakes to provide that "either party shall also be entitled to the right to a jury, to be demanded in the same manner as in a suit at law, and the verdict of such jury on any question of fact shall have the same force and effect in the circuit [court] in chancery, and in the supreme court on appeal, as the verdict of a

jury in an action at law. Whenever a jury is demanded as aforesaid, an issue or issues shall be framed under the direction of the court, if, in the opinion of the court, such issue shall be necessary to be submitted to such jury, and in all cases of trial in open court, whether with or without a jury, it shall be the duty of the court trying said cause to rule upon all questions of admissibility of testimony in the same manner and with the like effect as in a suit at law. . . . In case the cause shall have been tried by a jury on demand of either of the parties, either party shall in like manner be entitled to make and settle a case as provided in this section, and it shall not be necessary to set forth in such case all the testimony given upon such trial, but only so much thereof as may be necessary to a clear understanding of the questions of law arising therein. . . . Upon the case so made and filed, an appeal may be taken to the supreme court by any of the parties, as in ordinary chancery cases."

It requires but a little examination to discover that these changes cannot be carried into effect in practice, and are entirely in conflict with the rights of parties, as well as with the remainder of the retained chancery system. Merely formal defects could perhaps be corrected, but the defects are more than formal.

Apart from the serious question whether, under cover of amending one section of the Compiled Laws, the whole body of the laws can be revolutionized, it is very certain that laws passed for one purpose, and under one title or category, cannot be made to do duty under a foreign enactment, which was not in any way within their contemplated range. While the old law was adequate to secure the aid of jurors for advisory purposes, the case is different when an attempt is made to give a trial by jury which shall have the effect of a common-law inquest. The trial by jury in common-law cases is guarded by a large body of provisions designed to procure a fair and impartial jury, extending from the making of the jury-lists through the process of selecting and summoning regular jurors and talesmen to the completion of the panel through challenges and other tests. All of these provisions, whether statutory or not, belong to the machinery devised for the common-law courts, and cannot be adapted, without new and careful legislation, to anything else. But this new statute introduced other complications which are quite as serious.

When any matter becomes involved in a chancery suit, the necessities of justice and equity require that all persons and all things concerned in the controversy shall be brought before the court to have their respective interests charged or protected, and to end the controversy once for all. Specific relief is generally required, and usually more or less of the defendants have conflicting interests to a greater or less extent, which require different issues and different treatment; and these difficulties frequently become known or developed during the course of the investigation.

This law, as probably would be almost unavoidable if the essentials of common-law practice are followed, is framed on the theory of single contesting parties. No one party or set of parties can be authorized to become directors of the suit, and determine in what manner it is to be tried, or select the jury to try it. It would be difficult, at least, to have a case in which several parties have several interests, which may, nevertheless, be more or less affected by what happens to the rest, decided partly by a jury and partly in some other way. Under the standing practice, the only way to secure justice to all has been found to be to have the whole case heard at once, so that the same arbiter passes on all the varied interests, and adjusts them. Each has a right to have the whole of his case decided by one tribunal; and if a jury should find an issue in one way on one party's demand, and the court should find the same fact in another way, there could be no decision. So a jury might easily find a verdict which would have to be set aside for misdirection or improper dealings with testimony, and a second jury might find differently, and involve a new complication before the case is disposed of. The differences between law and equity issues create many more difficulties, which need not be dwelt on, because the defects are still more radical.

When a case is tried by a common-law jury, one verdict settles the whole issue, and, unless set aside, furnishes the complete basis of a judgment, which cannot, in anything, depart from it; and there is, and can be, no issue which the jury do not dispose of. The judgment follows as a matter of course, and, if taken to an appellate court, the verdict cannot be altered, and must stand completely good or completely bad. A verdict on part of the issues and a disagreement on the rest is no verdict. It is not possible to have one verdict in a suit in equity which shall decide the whole controversy,

and if it were, this law does not provide for it, and provides for nothing in its place. It makes no provision for a jury except on detached issues, unless, as is dimly suggested, the whole pleadings are laid before them; and if that should be done, it would be impossible to frame a general verdict on which any decree could be entered. At law, in all but a few possessory cases, the verdict is for the recovery of a specific sum of money, or a specific thing, on which a single and simple judgment can be rendered. In equity, there are few, if there are any, cases where specific relief is not required, and the adjustment of the conflicting or separate rights. If specific issues only are submitted to the jury, some part of the controversy must always be decided by the court; and in that case, the division would make it impossible, by any known means, to have the case disposed of in an appellate court. And this suggests another difficulty, which would, in any event, render this law inoperative.

The only method of review provided in the statutes is by an appeal, and that appeal is made as all appeals require it to be made, so as to lead to a review of the whole case, and a decision on the whole merits. The only conceivable purpose of this law is to make the verdict final on all that it covers. But the law forbids inserting in the case any more of the testimony than will explain the bearings of the rulings. If wrong rulings have been made, it contemplates their correction in some way. But if this is done, the verdict must be set aside. This statute does not provide for taking or settling exceptions. It provides no method for having this court decide on the rulings upon the admission or rejection of testimony, and it provides no means for supplying testimony which has been improperly ruled out, or for granting a new trial before the same or any other jury on the whole or any part of the case. It leaves the case subject to nothing but the appeal already provided for chancery decisions, and makes no provision whatever for either supplying omitted testimony, or for finding out what a jury would have done had there been no testimony improperly let in or shut out. It does not mean, as it could not lawfully mean, to prevent a review in this court, and yet it provides no method for getting it in any sufficient way. And it is open to the incurable mischief of introducing changes in such a crude and contradictory manner that, while there are many defects patent to all observers, there are probably many more which would appear whenever

any case actually arises in practice in the complicated controversies which the necessities of jurisprudence turned over to equity because common-law methods could not deal with them.

This leads to the inquiry whether it is competent for legislation to bring about any such radical change as is here attempted. We think it is not. The decisions of the United States supreme court before referred to do not bind state practice, but they nevertheless to some extent indicate the real difficulty. That tribunal did not decide that under the United States constitution there could be no change in equitable procedure, because the whole body of chancery practice has been repeatedly amended and simplified by that court. Their rulings mean neither more nor less than that there are various kinds of interests and controversies which cannot be left without equitable disposal without either destroying them or impairing their value. It is within the power of a legislature to change the formalities of legal procedure, but it is not competent to make such changes as to impair the enforcement of rights. In rude times, when there is no business, and no variety of property rights, very simple remedies are sufficient. But where the ordinary remedies have become inadequate to deal with more extended or peculiar interests, such as multiply in all civilized countries, different methods and different tribunals become necessary. The universally recognized basis of equitable jurisprudence, found in statutes and constitutions, as well as in the reports and text-writers, is the inadequacy of the common law to deal with these subjects. A principal basis of that inadequacy was the nature of the tribunal passing on the facts. In common-law issues, fact and law can be readily separated; but in the great majority of equity proceedings it is impossible to make any such separation. The functions of judges in equity cases in dealing with them is as well settled a part of the judicial power, and as necessary to its administration, as the functions of juries in common-law cases. Our constitutions are framed to protect all rights. When they vest judicial power they do so in accordance with all of its essentials, and when they vest it in any court they vest it as efficient for the protection of rights, and not subject to be distorted or made inadequate. The right to have equity controversies dealt with by equitable methods is as sacred as the right of trial by jury. Whatever may be the machinery for gathering testimony or enforcing decrees, the facts and the law

must be decided together; and when a chancellor desires to have the aid of a jury to find out how facts appear to such unprofessional men, it can only be done by submitting single issues of pure fact, and they cannot foreclose him in his conclusions unless they convince his judgment.

The very wise provision of our constitution, which by section 5 of article 6 directs the legislature to abolish distinctions between law and equity proceedings, is carefully worded; and requires it to be done only as far as practicable. It does not blend legal and equitable interests, although no doubt it does favor the removal of such distinctions between those as are nominal, rather than real. The purpose of the constitution has been very liberally carried out, and there is now hardly any distinction left that is merely formal. But the clause referred to was suggested, as all men know, by the then recent attempts in other states to abolish systems of procedure which had become overtechnical, and provide forms of remedy of a more simple character. In doing this the distinction in names between legal and equitable remedies was abolished. But it very soon became manifest to all jurists that the class of rights which, for want of a better definition, were loosely called "equitable," and which had only been included under that name because the common-law methods were not adapted to enforce them, differed from other rights in their essential nature, and not in form only, and that, by whatever name they were called, they could only be efficiently protected and made available by the means known as "equitable."

In all ages, and in all countries, this distinction by nature, which was never called "equitable" except in English jurisprudence, where it was first so called from an idea that the rights were imperfect because unknown in the rude ages, when property was scanty, and business almost unheard of in the regions outside of great cities, has been recognized and provided for by suitable methods substantially similar in character. Juries cannot devise specific remedies, or safely deal with complicated interests, or with relief given in successive stages, or adjusted to varying conditions. Theory amounts to nothing in the history of jurisprudence. The system of chancery jurisprudence has been developed as carefully and as judiciously as any part of the legal system, and the judicial power includes it, and always must include it. Any change which transfers the power that belongs to a judge to a jury, or to any other person or body, is as plain a violation of the

constitution as one which should give the courts executive or legislative power vested elsewhere. The cognizance of equitable questions belongs to the judiciary as a part of the judicial power, and under our constitution must remain vested where it always has been vested heretofore.

The case in which relator seeks our interference has never been heard by the court as it should have been, and a *mandamus* must be allowed to direct the circuit judge to rescind his decree, and allow the case to be brought to a hearing before the court for final disposal on pleadings, and on proofs to be properly taken.

MANDAMUS WILL NOT LIE to review discretionary duties of officers: Note to *Wood v. Strother*, 9 Am. St. Rep. 257, 258; *Sansom v. Mercer*, 68 Tex. 488; 2 Am. St. Rep. 505, and note 510; *Weeden v. City of Richmond*, 9 R. I. 128; 98 Am. Dec. 373, and note 375-377. Where nothing remains but the enforcement of a legal duty, the remedy is by *mandamus*: *Webster v. Newell*, 66 Mich. 505. An inferior court may be compelled by *mandamus* to exercise its discretion, though such discretion cannot be reviewed: *State v. Cramer*, 26 Mo. 75; but see *State v. Phillips*, 97 Id. 331; *McHenry v. Township Board*, 65 Mich. 9. And *mandamus* will lie, not to control discretion, but to ascertain whether any discretion at all exists: *State v. Rightor*, 40 La. Ann. 852; although the general rule is that the exercise of legal discretion cannot be controlled by *mandamus*: *State v. Ellis*, 40 La. Ann. 818.

JURY TRIAL IN EQUITY CASES. — Verdicts of juries in equity cases are merely advisory: *Sullivan v. Royer*, 72 Cal. 248; 1 Am. St. Rep. 51; and in such cases it is no error to refuse to grant a trial by jury: *Lane v. Schlemmer*, 114 Ind. 296; 5 Am. St. Rep. 621. Compare *Lee v. Tiltonson*, 24 Wend. 337; 35 Am. Dec. 624, and note 626; note to *Flint River S. B. Co. v. Roberts*, 48 Am. Dec. 188, wherein the general law as to jury trials in equity cases is discussed.

NEWMAN v. STEIN.

[75 MICHIGAN, 402.]

SLANDER — WHOLE CONVERSATION ADMISSIBLE IN EVIDENCE. — In an action of slander, plaintiff should be permitted to give the whole conversation in evidence, and all the words spoken by defendant, so long as they are part of the same transaction, and led up to the words charged in the declaration to have been spoken by defendant of and concerning plaintiff.

SLANDER — BURDEN OF PROOF is on plaintiff in an action of slander to show substantially that defendant spoke the words as charged in the declaration. This does not, however, exclude other words spoken in the same conversation.

SLANDER — MITIGATION. — In an action of slander, defendant should be allowed to testify in mitigation to provoking language used to him by plaintiff which caused him to utter the words charged as slanderous.

The law makes allowances for the infirmities of human nature, and for what is done in the heat of passion, produced by the improper conduct of the adverse party.

SLANDER — DAMAGES. — In actions of slander, where the words are not actionable *per se*, the plaintiff must both allege and prove that by reason of the words he has sustained some damages of a pecuniary nature; but where the words are actionable *per se*, no special damages need be alleged or proved, and the jury are warranted in giving such damages as shall compensate the plaintiff for the wrong and injury done, according to the circumstances of each case.

SLANDER — EXEMPLARY DAMAGES. — Under an allegation in slander, that plaintiff is greatly injured in her good name, fame, credit, and reputation, the jury would be warranted if they found that defendant spoke, uttered, or published the words alleged of and concerning plaintiff in awarding punitive or exemplary damages, if the facts proved show express and wanton malice.

SLANDER. — WHERE ACTUAL MALICE IS SHOWN in an action of slander, the jury may always give exemplary damages.

SLANDER — DAMAGES. — Where the words spoken in an action of slander are actionable *per se*, and defendant was actuated by malice, and wantonly intended to charge plaintiff with being unchaste, exemplary damages are recoverable. But if the words were spoken in the heat of passion, under provocation from plaintiff, this is such evidence of want of malice that the jury should consider it in mitigation of damages.

Hampden Kelsey, for the appellant.

Howard and Roos, for the defendant.

LONG, J. Plaintiff recovered six cents damages in an action on the case for slander against the defendant in the Kalamazoo circuit court, and brings the case to this court by writ of error.

It appears that the plaintiff, who is twenty-five years of age, and a single woman, lived with her mother, Mrs. Newman, and a little nephew, on an adjoining lot to the defendant in the city of Kalamazoo.

The defendant is a married man, his wife and several children constituting his household.

On July 10, 1887, some difficulty arose between the two families during the absence of the defendant. On his return in the evening he found his daughters in tears, and then learned from his family that the plaintiff, in an altercation about the children, who were playing on the sidewalk, had called his wife and daughter some vile names, when he at once stepped out of his door, and to the fence between the two places, and called to the plaintiff, who, with her mother, went out to the fence, where the defendant was standing. Here it is claimed by the plaintiff the defendant applied to her sev-

eral vile and opprobrious epithets, imputing to her a want of chastity, in the presence and hearing of a large number of people.

On the trial, the defendant did not attempt to justify the speaking of the words, either by his plea or in his testimony, and there is no dispute in the record but that the character of the plaintiff is above reproach.

The defense set up was, that the plaintiff had only a short time previous, and on the same day, applied several names to the wife and daughter of defendant imputing to them a want of chastity; that this grew out of a quarrel with the children, in which the little nephew of the plaintiff was involved; that defendant, coming home, and learning of the transaction, and while angry from its repetition to him by his family, went out and called the attention of the plaintiff and her mother to what had been told him by his family.

It is claimed by the defendant that the plaintiff did not deny the charges made by him, but reiterated the statements; and that, when he spoke the words imputed to him by plaintiff, he did not speak them of and concerning the plaintiff, but that all the words spoken by him had reference to a sister of the plaintiff, the mother of the plaintiff's little nephew, who was not present there.

Upon the issue so made the court submitted the case to the jury, instructing them, among other things, as follows: "If you are satisfied, by a preponderance of evidence in the case, that the language charged in the declaration, or any part of it, was used towards the plaintiff by the defendant, it imputed to her a want of chastity, and the words would be actionable in themselves, . . . and entitle the plaintiff to recover. . . . If they were spoken of and concerning plaintiff's sister, and not of the plaintiff, then the jury must acquit."

The contention of counsel for the plaintiff is, that while the plaintiff was on the witness-stand, being examined as a witness in her own behalf, the court ruled out a portion of her testimony; that this testimony was competent for the purpose of showing that it was the plaintiff to whom the defendant addressed his words, and not of her sister. The plaintiff testified: "I heard him say, if the God damned bitch comes out here I will tell her what she is. He was looking at me when he said that. I stepped out on the porch, and said: 'Mr. Stein, are you talking about me? If you are, anything you say about me I will make you prove.' He said: 'I will, and

I can,—every word of it.’ Then I stepped out. He called me over to the fence. He told me to come over to the fence, and he would tell me what I was. I went over to or near the fence. He next said: ‘It ain’t forgotten what you did at Rome City. The conductor that had you out on the island all day is right here. He will prove it, and so will I.’”

Here the witness was interrupted by defendant’s counsel by the claim that this was not under the issue made, and this part of the testimony of the plaintiff was stricken out under such objection, to which counsel for plaintiff excepted.

It appeared that no such charge was made by the declaration, and for that reason the testimony was excluded by the court.

Plaintiff’s counsel contends, however, that if he had been permitted to show the whole conversation, and his charge against the plaintiff at Rome City, on the train, and other instances which could have been given, it would have convinced the jury that the plaintiff was the one of whom he spoke the words charged in the declaration, and no other person, as the defendant testified that he had not seen the sister for seven or eight years.

I think that the testimony was competent. The plaintiff should have been permitted to give the whole conversation and all the words spoken by the defendant to her there. It was a part of the same transaction, and led up to the words charged in the declaration to have been spoken by defendant of and concerning the plaintiff.

The burden was on the plaintiff to prove substantially that the defendant spoke the words as charged in the declaration. This would not, however, exclude other words spoken there in the same conversation: *Brown v. Barnes*, 39 Mich. 211; 33 Am. Rep. 375.

These other words would not make out the cause of action, but the whole conversation may properly be given, and in this instance it would have had a tendency at least to contradict the theory and claim of defendant that the words charged in the declaration were not spoken of and concerning the plaintiff. We think the court was in error in excluding this testimony.

Mrs. Clarinda Newman was called as a witness for plaintiff, and testified to what the defendant said about the plaintiff being at Rome City. This the court, at the request of counsel for defendant, also struck out. We think this was error.

This testimony was competent, for the reason given as to the testimony of the plaintiff.

Claim is also made by counsel for plaintiff that the court was in error in permitting the defendant to testify that he was made angry by what his children said to him in regard to the language used to them by plaintiff, and their mother, and that the court was also in error in its charge to the jury, that, if the plaintiff provoked the defendant to utter the words, by language used towards his daughters, they should consider that fact in mitigation of damages. In this there was no error. The law makes allowances for the infirmities of human nature, and for what is done in the heat of passion, produced by the improper conduct of the adverse party: *Ritchie v. Stenius*, 78 Mich.

Counsel for plaintiff also complains in his brief of the charge of the court on the question of damages. The court instructed the jury: "This is not a case where exemplary or punitive damages can be given." This was error.

In actions for slander, where the words are not actionable *per se*, the plaintiff must both allege and prove that by reason of the words he has sustained some damages of a pecuniary nature.

In such actions, where the words are actionable in themselves, no special damages need be alleged or proved, and the jury are warranted in giving such damages as shall compensate the plaintiff for the wrong and injury done. What amount of damages may be given depends upon the circumstances of each particular case.

Under proper pleadings and proofs the plaintiff may recover damages for all actual loss and injuries sustained, including mental suffering and discomfort arising from the public disgrace and indignity caused by the slander: *Field on Damages*, sec. 691.

The allegation and claim of damages in the declaration in the present case is, "that the said plaintiff is greatly injured in her good name, fame, credit, and reputation."

Under such an allegation, the jury would be warranted, if they found the defendant spoke, uttered, or published the words alleged of and concerning the plaintiff, in awarding punitive or exemplary damages, if the facts proved established express and wanton malice.

Where actual malice is shown in an action for slander, the jury may always give exemplary damages: *Knight v. Foster*,

39 N. H. 576; *Guard v. Risk*, 11 Ind. 156; *Armstrong v. Pier-son*, 8 Iowa, 29; *Daly v. Van Benthuyssen*, 3 La. Ann. 69.

We think the court was in error in this part of its charge. The words charged to have been spoken were actionable *per se*, and if the defendant was actuated by malice, and in a wanton manner intended to charge the plaintiff with being unchaste, then exemplary damages were recoverable. But if the defendant spoke the words in the heat of passion, provoked thereto by what plaintiff had said of his family, and which had been communicated to him as coming from the plaintiff herself, this would be evidence of the want of malice, and the jury should consider it in mitigation of damages.

For the errors pointed out, the judgment of the court below must be reversed, with costs, and a new trial ordered.

SLANDER AND LIBEL — WHOLE CONVERSATION OR PUBLICATION ADMISSIBLE. — The entire article alleged to be libelous can be considered by both the court and jury: *Mosier v. Stoll*, 119 Ind. 245.

SLANDER AND LIBEL — BURDEN OF PROOF. — Where words are not actionable *per se*, the burden of showing express malice is upon plaintiff: *Stewart v. Hall*, 83 Ky. 376; *Byam v. Collins*, 111 N. Y. 143; 7 Am. St. Rep. 726, and note 741; *Davis v. Sladden*, 17 Or. 259. In order to recover for libelous words which are privileged, the burden of proving actual malice is upon plaintiff: *Bacon v. Michigan etc. Ry Co.*, 66 Mich. 166.

SLANDER AND LIBEL — MITIGATION. — The fact that slanderous words were spoken in the heat of passion, which was provoked by one concerning whom they were spoken, may be shown in mitigation of damages: *Jauch v. Jauch*, 60 Ind. 186; 19 Am. Rep. 690; *Mousler v. Harding*, 33 Ind. 176; 5 Am. Rep. 195; but see *Quinby v. Minnesota Tribune Co.*, 38 Minn. 528, 8 Am. St. Rep. 693, wherein it is held that this rule is inapplicable when there has been time and opportunity for hot blood to cool before the slander was uttered or libel published. As to the evidence which is admissible in mitigation in actions of libel and slander: Extended note to *Alderman v. French*, 11 Am. Dec. 180-182. As to the law generally, with respect to damages in cases of libel and slander: Extended note to *Terwilliger v. Wanda*, 72 Id. 426-436. Under a plea of not guilty, in an action of libel, defendant can prove in mitigation of damages that there was a general suspicion and belief of the truth of the published charge: *Montgomery v. Knox*, 23 Fla. 595.

SLANDER AND LIBEL — PLEADING. — Damages must be alleged, if the words are not actionable *per se*: *Terwilliger v. Wanda*, 17 N. Y. 64; 72 Am. Dec. 420, and note 426; but special damages need not be alleged when the alleged libelous matter is actionable *per se*: *Montgomery v. Knox*, 23 Fla. 595.

EXEMPLARY DAMAGES. — As to when and under what circumstances exemplary damages are recoverable, see *Columbus etc. Ry Co. v. Bridges*, 86 Ala. 449; 11 Am. St. Rep. 58, and particularly note 65, 66; *State v. Chicago etc. Ry Co.*, 73 Wis. 147; 9 Am. St. Rep. 769, and note 777; *Pittsburgh etc. Ry Co. v. Lyon*, 123 Pa. St. 140; 10 Am. St. Rep. 517, and note 521, 522. In California, exemplary damages may be awarded for tortious acts, and are not confined to cases where malice appears on the part of defendant: *St. Ores v. McGlashan*, 74 Cal. 148.

WORMSDORF v. DETROIT CITY RAILWAY COMPANY.

[75 MICHIGAN, 472.]

NEGLIGENCE — CONCURRING NEGLIGENT ACTS — EVIDENCE. — In an action for damages for personal injury, where the accident and resulting injury are alleged as having been caused by several concurring negligent acts and omissions of defendant, it is necessary to prove each element of negligence alleged, in order to recover.

STREET-RAILWAY COMPANY IS BOUND TO PROVIDE SUITABLE CARS, with proper and safe appliances for checking their speed on a descending grade, and for stopping them as necessity or convenience may require, and to keep the same in good repair; to provide safe horses for the transportation of passengers, and careful and prudent drivers.

STREET-RAILWAY COMPANY IS NOT LIABLE as an insurer of the safety of its passengers, and is only answerable for any injury which may happen through its own negligence, or the negligence or default of its servants.

STREET-RAILWAY COMPANY IS NOT REQUIRED to furnish its road with new cars, nor is it liable for using old ones, but whether new or old cars are used, it is required to keep them in good repair, and fit for use, so as not to endanger the safety of passengers.

EVIDENCE — NEGLIGENCE. — In an action against a street-railway company for damages for personal injuries, evidence that it was a matter of general knowledge and rumor among the employees that a car had been on the road ever since it was built, is inadmissible, as hearsay and irrelevant.

EVIDENCE — NEGLIGENCE. — In an action against a street-railway company for damages for personal injury, evidence of the general reputation of a certain horse, among the employees of the company, as being an unsafe and unreliable horse to drive before a street-car, and that knowledge of such reputation was brought home to the general superintendent of the company, is admissible, as tending to show negligence in the company in providing an unsafe horse, and using it after it knew, or should have known, its unfitness for the work.

EVIDENCE — CONVERSATIONS — RES GESTÆ. — In an action against a street-railway company for damages for personal injury, a conversation between the car-driver and the company's superintendent, as to the cause of the accident, immediately thereafter, is perhaps admissible as part of the *res gestæ*; but a conversation between the same parties as to a past transaction, which was not part of the *res gestæ*, is not admissible to bind the company with notice of the defect claimed in the complaint.

Brennan and Donnelly, and Sidney T. Miller, for the appellant.

Henry Ohrns and S. E. Engle, for the plaintiff.

CHAMPLIN, J. This action was brought to recover damages arising from an injury to plaintiff while riding upon a street-car.

The negligence of the defendant was alleged to have consisted in neglecting to furnish proper and safe brakes and appliances for slacking the speed of cars in going a down-

grade, or for stopping a car, and in wrongfully and negligently furnishing and providing a braking apparatus with a weak, cracked, and defective connecting-rod, which was utterly inadequate, unsafe, and positively dangerous to life and limb; that the rod was partly cracked and broken, and its situation and location under the car was open and exposed to view, and the defendant, by the exercise of ordinary care, could and would have known of the unsafe condition of said rod and braking apparatus, and did know thereof; and that in going over a bridge above the tracks of the Michigan Central railroad, and descending the grade thereon westward, the said connecting-rod broke asunder, rendering the front brake useless, so that the driver was powerless to check the speed of the car.

Also in neglecting to provide the car with a conductor to apply the rear brake, and conduct and assist in the care of the passengers.

Also in providing and furnishing as one of the team a dangerous and fractious horse, which had for a long time before then been known to defendant to be dangerous and at times unmanageable; and that the horses became frightened and unmanageable, and the cars rushed upon their heels, and they ran away.

Also in the neglect of the driver of the car in which the plaintiff was a passenger, which was going east, to stop and permit her to alight, but wrongfully and negligently accelerated the speed of his horses, so that the two cars came together with a crash.

The declaration alleges that by means of the premises aforesaid, and the wrongful conduct and negligence of the defendant and its driver aforesaid, the plaintiff was injured as stated in the declaration.

The declaration contains but one count, and the accident and resulting injury are alleged as having been caused by the several concurring negligent acts of and omissions of defendant. Had the connecting-rod not broken, although the horse was fractious, and although there was no conductor, and although the driver of the east-bound car did accelerate his speed, and had not stopped and suffered the plaintiff to alight, the injury would not have been received by plaintiff. And so if either duty upon the violation of which negligence is predicated had been performed, the accident would not have happened. It was necessary to the plaintiff's case, under the

pleadings, to establish by proof each element of negligence alleged.

The testimony introduced by the plaintiff tended to show that Mr. Barry was superintendent of the road, and had general charge of the cars, horses, and men used and employed upon defendant's road, or at least of that portion of it upon which the accident happened.

The defendant was in duty bound to furnish and provide suitable cars, with proper and safe appliances for checking the speed of the cars on a descending grade, and for stopping them as necessity or convenience required, and to keep the same in good repair, and to provide safe horses for the transportation of passengers, and careful and prudent drivers. The defendant, however, is not liable as an insurer of the safety of its passengers, and is only liable for any injury which may happen through its own negligence or default, or the negligence or default of its servants.

There is no principle of law which requires the defendant to furnish its road with new cars to transport passengers, or which makes it liable for using old ones. Whether new or old, it is required to keep them in good repair, and fit for use, so as not to endanger the safety of passengers.

Plaintiff's counsel was permitted to ask his witness this question: "Was it a matter of general knowledge and rumor among the men that this car had been on the road ever since it was built?" The witness answered: "Yes, sir; that was all the talk about there. Men who were there on ahead of me, that left the road before I went there, told me that this car was on there just after the road started running."

The court erred in admitting this testimony. It was not only hearsay, but entirely irrelevant to the issue.

It was shown that one of the horses which was attached to the car that collided with the one in which plaintiff was injured, known as Gray Fannie, was a fractious and ungovernable horse, and required great care and skill at all times to handle. Knowledge of these facts was brought home to Mr. Barry, the superintendent of the company, which was sufficient to charge defendant with notice and knowledge of the unsafe disposition and habits of the animal, but in addition the plaintiff was permitted to show the general reputation of the horse Gray Fannie among the drivers and employees of defendant for being an unsafe and unreliable horse to drive before a street-car, and her propensity to run if anything came

against her heels, as tending to prove that defendant had notice of the unfitness of the animal for street-car service, and retained it therein after it had such notice or knowledge. The defendant claims that such testimony was merely hearsay, and inadmissible.

The testimony was clearly admissible, as tending to show the negligence of defendant in providing an unsafe horse, and using it after it knew, or should have known, its unfitness for the work: *Davis v. Detroit etc. R. R. Co.*, 20 Mich. 105; 4 Am. Rep. 384; *Hoyt v. Jeffers*, 30 Mich. 181; *Hills v. Chicago etc. R'y Co.*, 55 Id. 437.

The testimony tended to show that within a few minutes after the collision, the superintendent, Mr. Barry, arrived at the place, and the court permitted a witness to testify that Mr. Barry asked the driver of the west-bound car what the cause of the accident was, and the driver's reply that he thought it was because the brake-chain broke.

This perhaps was admissible as part of the *res gestæ*, under our ruling in the case of *Keyser v. Chicago etc. R'y Co.*, 66 Mich. 390. But it was error to permit another witness to testify to a conversation which he claimed he heard between Mr. Barry and the driver, immediately after the accident, as follows: "The driver told Mr. Barry that he had reported the car to the barn as having a bad brake; that he had reported the car to the barn before; that he did n't hear Barry ask anything as to the cause of the accident."

This narration of the driver was of a past transaction, and was no part of the *res gestæ*, and was inadmissible to bind the defendant with notice of the defect claimed.

The court charged the jury that there were four grounds of recovery, and that they might all stand or fall separately, and that, if they had satisfied the jury that the accident was caused by the negligence of the defendant upon either of the grounds stated, although they had failed in respect to the other three grounds, the plaintiff was entitled to recover.

We do not think the pleadings will support this portion of the charge. The declaration alleges wherein the defendant was negligent, and then alleges that by means of the premises aforesaid, which premises were the concurring acts of negligence set out, the accident occurred. There are four several acts of negligence alleged, but neither, alone, is said to have caused the injury, but the combined acts are alleged to have done so. If the breaking of the connecting-rod was purely

accidental, and occurred without the fault or neglect of defendant, and the car rushed upon the horses upon the descending grade, and the defendant was not at fault in the team running away, I do not think the declaration is so drawn as to place the company in fault for the sole neglect of the driver of the east-bound car to stop and invite his passengers to alight. It would have to contain allegations of fact directly contrary to what is now charged: *Thompson v. Flint R. R. Co.*, 57 Mich. 300.

The judgment must be reversed, and a new trial ordered.

CARRIERS OF PASSENGERS. — Carriers are bound to use the highest practicable degree of care to secure the safety of their passengers, and any negligence on their part is actionable: *Louisville etc. R'y Co. v. Snyder*, 117 Ind. 425; 10 Am. St. Rep. 60, and cases collected in note 64, as to the care required of carriers of passengers.

EVIDENCE. — Hearsay testimony, as a general rule, is not admissible: *Brown v. People*, 17 Mich. 429; 97 Am. Dec. 195; *Sisson v. Cleveland etc. R. R. Co.*, 14 Mich. 489; 90 Am. Dec. 252; *Printup v. Mitchell*, 17 Ga. 558; 63 Am. Dec. 258; *Walker v. Forbes*, 25 Ala. 139; 60 Am. Dec. 498; *McGoon v. Irwin*, 1 Fenn. 526; 44 Am. Dec. 409; *Lynch v. Postlethwaite*, 7 Mart. (La.) 69; 12 Am. Dec. 495; *Schultz v. McLean*, 76 Cal. 608; *Hollister v. Cordero*, 76 Id. 649; *Van Horn v. Overman*, 75 Iowa, 421.

EVIDENCE — RES GESTÆ. — As to what declarations are admissible as *res gestæ*, see *Erie etc. R. R. Co. v. Smith*, 125 Pa. St. 259; 11 Am. St. Rep. 895, and cases in note 900; *Leahy v. Cass Ave. R'y Co.*, 97 Mo. 165; 10 Am. St. Rep. 300, and note 306.

DUNDAS v. CITY OF LANSING.

[75 MICHIGAN, 490.]

EVIDENCE — RES GESTÆ — STATEMENT AS TO CAUSE OF INJURY. — Narration of past occurrences as to the manner in which a party had been injured cannot be given in evidence by an attending physician when not necessary to correctly diagnose the case.

MUNICIPAL CORPORATIONS — KNOWLEDGE OF OFFICERS IS KNOWLEDGE OF CORPORATION. — The individual knowledge of officers or agents of a municipal corporation who in such capacity have powers or duties conferred upon them in reference to a given matter, is the knowledge of the corporation, and notice to such officers or agents is notice to the corporation so as to bind it.

MUNICIPAL CORPORATIONS. — The statutory liability of municipal corporations depends upon the true interpretation of the statute creating it.

MUNICIPAL CORPORATIONS — NOTICE OF DEFECT IN SIDEWALK. — Where a municipal corporation can acquire no knowledge of defective streets or sidewalks except through its aldermen, city marshal, or street inspectors, knowledge of or notice to any such agents of such defect is notice to the corporation after a meeting of the common council composed

of such officers, and attended by one of them, having such notice or knowledge.

MUNICIPAL CORPORATIONS — LIABILITY FOR DEFECTIVE SIDEWALK. — In order to make a city liable for injury received through a defective sidewalk, it must be shown that it had notice of the particular defect complained of, and not of other defects which did not cause the injury alleged.

MUNICIPAL CORPORATIONS — LIABILITY FOR DEFECTIVE SIDEWALK — EVIDENCE. — In an action against a city for injuries received through a defective sidewalk, evidence which has no tendency to show that the city had actual notice of the defect complained of, and too remote and indefinite to prove that the particular defect had existed such length of time that notice might be presumed or inferred, is inadmissible.

MUNICIPAL CORPORATION CANNOT BE HELD LIABLE FOR DAMAGES, caused by the non-repair of the cross-walk at a certain street, by showing that sidewalks in that vicinity were out of repair.

MUNICIPAL CORPORATIONS. — CONTRIBUTORY NEGLIGENCE, when a person is injured through a defect in the street or sidewalk of which he had previous knowledge, is generally a question for the jury.

MUNICIPAL CORPORATIONS — CONTRIBUTORY NEGLIGENCE. — In an action against a city for injury through a defect in a sidewalk prepared and provided for the use of pedestrians, when the accident happened in the night-time, and while plaintiff was pursuing the ordinary traveled way, the question of his negligence is one of fact for the jury to determine.

EVIDENCE. — IN ACTION AGAINST A CITY for injury through a defective sidewalk, after plaintiff has testified in her own behalf, her counsel cannot introduce evidence to show that her memory had become weakened, and thus form a basis for argument that she was mistaken in her testimony, and exercised due care and prudence.

R. A. Montgomery, for the appellant.

Cahill and Ostrander, for the plaintiff.

CHAMPLIN, J. This action was brought to recover damages for a personal injury alleged to have been caused by the neglect of defendant in not keeping a cross-walk in repair. An objection is raised by the defendant which goes to the plaintiff's right of action, although not affecting her cause of action, which, if disposed of in favor of the defendant, will suspend further proceedings in this suit, and render it unnecessary to pass upon other questions raised by the record.

The charter of the city of Lansing contains the following provision: "The council shall audit and allow all accounts chargeable against the city, but no account or claim or contract shall be received for audit or allowance unless it shall be accompanied with an affidavit of the person rendering it, which affidavit may be taken and certified by any member of the common council, to the effect that he verily believes

that the services or property therein charged have been actually performed or delivered for the city; that the sums charged therefor are reasonable and just; and that, to the best of his knowledge and belief, no set-off exists, nor payment has been made on account thereof, except such as are indorsed or referred to in such account or claim. And every such account shall exhibit in detail all the items making up the amount claimed, and the true date of each. It shall be a sufficient defense in any court, to any action or proceeding for the collection of any demand or claim against the city, that it has never been presented, verified as aforesaid, to the council for allowance, or that the claim was presented without the affidavit aforesaid, and rejected for that reason, or that the action or proceeding was brought before the council had a reasonable time to investigate and pass upon it": Sec. 17, tit. 4, Act No. 282, Local Acts 1875.

The amendments of 1883 do not affect the point under consideration: See Local Acts 1883, p. 784.

The record shows that on the sixteenth day of January, 1888, the plaintiff presented her claim to the common council in detail, in which she explained when, where, and how the accident happened, her consequent injury, her expenses incurred for medical attendance, medicine, and loss of time resulting from such injury. She stated that she had suffered greatly in body and mind by reason of her injuries; that she was unable to state any amount which would be adequate for the pain and suffering she had endured, and must continue to endure, nor her loss in case disability should prove to be permanent; but if her claim should be recognized by the city in the spirit of fairness, and an adjustment thereof speedily made, she would accept the sum of two thousand dollars, in addition to the other items, which amounted to eighty-one dollars. She asked that her claim be investigated by the council, and a reasonable and just allowance made her as compensation. Her claim was verified by her affidavit, in which she stated that no set-off exists to her claim, nor has any payment been made on account thereof.

The claim was referred to the city attorney, who reported it back, with the recommendation that the same be laid upon the table, which report and recommendation was adopted by the unanimous vote of the council.

No investigation was made by the council into the facts and circumstances or merits of the claim, and on April 23, 1888,

this suit was commenced to recover her damages for the same claim so presented to the council.

We think the plaintiff complied substantially with the requirements of the charter. Ample time and opportunity were afforded the council to investigate the merits of the claim presented, had they chosen to do so. The plaintiff is not barred from a recovery by the charter provisions mentioned.

The plaintiff claims that on Thanksgiving Day, 1887, as she was traveling from her place of employment to her home, at about seven o'clock in the evening, accompanied by two of her children, she stepped in a hole in the cross-walk as she was crossing Butler Street, and partly fell, and received a severe strain in her back, which occasioned an injury to her spine, and from the effects of such injury she has suffered great bodily pain, and become disabled from doing work; that she was in the exercise of ordinary care, and that the city was negligent in not keeping the cross-walk in repair after it had notice or knowledge of its unsafe condition. The hole was caused by a broken plank in the cross-walk directly over the gutter. The plank was from six to eight inches wide, and had broken about eighteen inches from the west stringer, and that length had been torn out and removed; thus making the hole about eight by eighteen inches, and about eighteen inches deep to the bottom of the gutter.

On the fourth day after the accident plaintiff sent a request to her employer, a Mr. Wilson, to send her some liniment. Instead of doing so, he sent her a physician, Dr. Ostrander, who testified to making an examination of the injuries of plaintiff three or four days after Thanksgiving Day. He testified fully as to her condition, and to her complaints as to her ailments, and against the objections of the counsel for defendant, he was permitted further to testify as follows: "She told me that she stepped in the hole at the cross-walk, and that she fell quite a distance. I think she said she stepped in with the right foot, but I am not certain about that, and that she received a severe shock, severe wrench to her back, in falling that distance, and tried to save herself, and that she came on home, and suffered a great deal that night,—a great deal of pain."

The court erred in permitting the declarations of the plaintiff, as to the manner and circumstances of her injury, to be given in evidence. There is no pretense that they were a part of the *res gestæ*. They were not necessary to enable the phy-

sician to correctly diagnose her case. He had testified fully to that already. The only purpose which such testimony could answer would be to establish the fact, which was disputed, that she had received the injury complained of on account of a defect in the cross-walk. This is made more manifest by the question by which such testimony was followed, namely: "What did you think at that time as to whether the symptoms that you found there could be accounted for by such an injury as she described? Can you tell the jury directly whether or not such an injury as she complained of could have been caused in the manner that she described to you at that time?"

Objection was timely made to this question, and was overruled. The witness answered: "Well, it could have been caused by the accident that occurred."

That narrations of past occurrences as to the manner in which a party has been injured cannot be given in evidence by an attending physician, any more than by a non-professional man, is settled in this court by the case of *Merkle v. Township of Bennington*, 58 Mich. 160; 55 Am. Rep. 666. The testimony should have been excluded.

The questions put to Dr. Shank, calling for a narration from the plaintiff of the way the injury occurred, should have been excluded for the same reason.

The statute creating the liability of municipal corporations, and giving a right of action for negligence to a party injured, contains this proviso: "That in all actions brought under this act it must be shown that such township, village, or city has had reasonable time and opportunity, after knowledge by or notice to such township, village, or city that such highways, streets, bridges, sidewalks, cross-walk, or culvert have become unsafe or unfit for travel, to put the same in the proper condition for use, and has not used reasonable diligence therein after such knowledge or notice": Laws 1887, act No. 264, sec. 2.

The plaintiff, in order to prove notice to the city, introduced testimony to show that actual notice was given to the alderman of the ward, in which the cross-walk in question was located, of the defective condition of sidewalks in the vicinity of the defective cross-walk which occasioned the injury as claimed. This notice was given in the latter part of April or the forepart of May, 1887, and the accident occurred in November. There was testimony introduced tending to show

that the particular defect complained of had existed six months prior to the accident to plaintiff.

The individual knowledge of officers or agents of a municipal corporation who in such capacity have powers or duties conferred upon them with reference to a given matter, is the knowledge of the corporation, and notice to such officers or agents is notice to the corporation, and the corporation is bound or affected by such knowledge or notice.

Where the liability of the municipality is created by statute, such liability must depend upon a true interpretation of the statute under which it is created. The charter of the city of Lansing provides that "the common council shall be commissioners of highways for said city, and shall have the care and supervision of the highways, sidewalks, streets, bridges, . . . therein, not belonging to or occupied by the state; and it shall be their duty to give directions for the repairing, preserving, improving, cleansing, and securing of such highways, . . . and to cause the same to be repaired, cleansed, improved, and secured from time to time, as may be necessary; . . . to divide said city from time to time into so many highway districts as they shall deem expedient, by an ordinance or resolution entered in their minutes; to appoint and assign to each of such districts so many inspectors of streets as they shall from time to time deem proper": Local Acts 1875, title 12, sec. 14, act No. 282.

"It shall be the duty of the street inspectors of the several ward districts to perform, or cause to be performed, all such labor, repairs, and improvements upon the highways, streets, sidewalks, . . . within the city, as the council or city marshal shall direct to be done by or under their supervision": Title 5, sec. 25.

Section 21 of the same title provides that "it shall be the duty of the marshal to superintend, under the general direction of the common council, all work to be done or performed, ordered, or required to be done or performed upon or in relation to any of the public streets, walks, . . . of said city."

The city is divided into six wards, and two aldermen are elected in each ward. The mayor and aldermen of said city constitute the common council. The city attorney, city marshal, city auditor, street commissioners, city surveyor, and engineer of the fire department have seats in the council, with the right to take part in all its proceedings and deliberations on all subjects relating to their respective departments, but

without the right to vote, and may be compelled to attend the meetings of the council the same as members: Act No. 338, Local Acts 1883, tit. 4, sec. 10.

Under these provisions of the charter, the primary control over the streets, and the authority to direct repairs, are vested in the common council. The city marshal is superintendent of all work done, or ordered by the common council, in relation to the public streets, and the street inspectors are to do or cause to be done all repairs upon the streets which the council or city marshal shall direct to be done by or under their supervision. The clause of the charter authorizing street "commissioners" to have a seat in the common council evidently refers to street "inspectors," as the council are given authority to appoint "street inspectors," but I find no such officer as "street commissioner" who is either elected or appointed by the terms of the charter.

As the corporation can acquire no knowledge of defective streets and sidewalks, except such knowledge as is possessed by the aldermen of the city, or the city marshal or the street inspectors, who are the only agents having any duty to perform with reference to keeping streets in repair, it would seem to follow that knowledge of any such agents of a defect in streets or sidewalks would be the knowledge of the corporation, and that actual notice given to either of these agents of such defects would be notice to the corporation.

Now, while an individual alderman, not acting in a meeting of the council, has no control or supervision over the streets any more than a private citizen, yet when he meets in council he does have a voice in saying what repairs shall be made, and if a meeting of the council has been held after knowledge by or notice to him, there is no good reason why such knowledge or notice should not be imputed to the body of which he is a member, based upon the duty which he owes to the public to impart his knowledge affecting the public interest to the council.

For the same reason should the knowledge of the city marshal and street inspectors be held to be the knowledge of the council. They are entitled to seats in the body, and to be heard upon the matters under their supervision, and the keeping of streets in repair comes under their supervision.

Had each alderman of the city seen this hole in the walk, and been cognizant that it had been there for six months, it would be absurd to hold that the collective body called the

common council had no knowledge of what each individual composing it knew full well. The duty of all to bring the matter of repair before the council for its action is no greater than the duty of each member to do so who is possessed of such knowledge. The aldermen represent the city in respect to those matters placed under the control of the council, and are so far its agents that notice to them with regard to such matters is notice to the principal: *Fulton Bank v. New York etc. Canal Co.*, 4 Paige, 127; *North River Bank v. Aymar*, 3 Hill, 262; *United States Bank v. Davis*, 2 Id. 451; *National Security Bank v. Cushman*, 121 Mass. 490; *Trapnell v. City of Red Oak Junction*, 76 Iowa, 744; *Carter v. Town of Monticello*, 68 Id. 178.

It must be borne in mind, however, that the knowledge or notice which the statute requires is that of the particular defect complained of, and not knowledge or notice of other defects, which, although they are shown to exist to the knowledge of the city, did not occasion the injury alleged.

The longest time the testimony of any of the witnesses in this case showed the defect in the cross-walk to have existed, was six months, and the notice to the alderman was prior to that time; and the notice to the city marshal was something like two years prior to the accident. The notice given was as to the defective condition of the sidewalks generally, and not of any particular defect. Such testimony ought not to have been received. It had no tendency to show actual notice of the defect complained of, and it was too remote and indefinite for the purpose of proving that the particular defect had existed such a length of time that notice might be presumed or inferred. The city cannot be held liable for damages caused by the non-repair of the cross-walk at Butler Street by showing that sidewalks in the vicinity were out of repair. In *Grand Rapids etc. R. R. Co. v. Huntley*, 38 Mich. 540, 31 Am. Rep. 321, Campbell, C. J., said: "We are also of opinion that no defects in the track could be relied on to show negligence contributing to the accident except those existing where the track was injured or displaced, and that testimony as to the condition of the road away from the scene of the injury was improper to make out a cause of action, and could only tend to raise false issues. The testimony should be confined to the time as well as place of the accident."

To the same effect are *Collins v. Inhabitants of Dorchester*, 6 Cush. 396; *Robinson v. Fitchburg etc. R. R. Co.*, 7 Gray, 92;

Maguire v. Middlesex R. R. Co., 115 Mass. 239; *Bailey v. Township of Trumbull*, 31 Conn. 581; *Jacques v. Bridgeport Horse R. R. Co.*, 41 Id. 61; 19 Am. Rep. 483.

In this case the plaintiff was permitted to produce testimony tending to show generally the bad and defective condition of the sidewalks a block or more each way from the cross-walk on Butler Street. This was error. It is going far enough to hold that it may be shown that accidents have happened to other people who were exercising ordinary care, on account of the particular defect complained of; but such testimony is admissible mainly as tending to show the dangerous character of the defect,—in other words, that on account thereof the street or sidewalk or cross-walk was not reasonably safe and fit for travel. Very remotely, and in connection with other testimony showing the length of time the defect had existed, it might have a bearing upon the question of notice to the municipality: *Smith v. Township of Sherwood*, 62 Mich. 159; *Tomlinson v. Derby*, 43 Conn. 562.

There was abundance of testimony tending to show that the defect in the cross-walk at Butler Street was in plain sight, and obvious to any person passing along the street, and that it had existed such a length of time as justified the jury in finding that the city had notice of the defective and dangerous condition of the cross-walk.

The question in the case that most perplexes us, is the contributory negligence of the plaintiff. She testified as a witness in her own behalf, and, so far as any impression can be derived from the record, she gave her testimony intelligently and truthfully. There is no indication from her answers of any impairment of intellect or of memory. She says that she was on her way home from her daily labor, walking in company with two of her children,—one a daughter of the age of eighteen, and the other a son of the age of seven; that the time was from seven to eight in the evening; that the weather was stormy, either a slight mist or snow falling; that she had traveled over the same walk for several weeks, twice a day, for three, four, and five days in a week, and had known of the broken plank and hole in the cross-walk at the Butler Street crossing from June to the time of the accident; that one of her children was upon one side of her, and the other upon the other side of her, and, as she was crossing Butler Street, she stepped into the hole in the cross-walk, and partially fell, and was caught by her eldest daughter, so that she did not fall

down; that she passed right on home, but the result of stepping into the hole was to severely wrench her back, causing, as the testimony tends to show, injuries of lasting and serious character.

She testified that she was in a hurry to get home, and was not thinking about the hole in the walk, nor looking for it, and that if she had been thinking about it, or looking for it, she would not have stepped into it; that she was sure it was because she did not think of it that she stepped in; that she did not look for the hole. She also testified that she could not recollect what she was thinking about or looking at when she stepped in.

Counsel for defendant claims that it conclusively appears, from her own testimony, that she was not in the exercise of ordinary care, and that a verdict should have been directed for the defendant on the ground that her own negligence contributed to the injury.

The question of contributory negligence, when a person is injured through a defect in the street or walk of which he had previous knowledge, is one of some difficulty. Such knowledge does not always bar a party from a right of recovery, as we held in *Lowell v. Township of Watertown*, 58 Mich. 568.

There are many cases reported where, under the circumstances attending the transaction, courts have rightly held that the party was not entitled to a recovery where the danger was apparent and known, and the injury resulted from their own carelessness and inattention.

Where the defect is in the walk itself, prepared and provided for the use of pedestrians, and the accident happened in the night-time, and while pursuing the ordinary traveled way, the question of the plaintiff's care should be submitted to the jury as a question of fact.

It is doubtless true, as plaintiff testified, that had she been at the time upon the lookout for this hole in the walk, she might have seen and avoided it; but the question is, Was she negligent, under all the circumstances and surroundings, in not seeing and avoiding it? The darkness of the night, the storm, her anxiety to get home, are all circumstances that should be weighed as bearing upon her conduct upon that occasion. The question is not free from doubt, and when it is not, it should be submitted to the jury.

The plaintiff's counsel endeavored to explain away the frank avowal of the plaintiff in her testimony,—1. By showing that

she had cautioned her children to be careful, and spoke about the walk being bad; 2. By introducing testimony to show that plaintiff's memory had become weakened, and thus to form the basis for argument to the jury that she was mistaken in her testimony, and that she did have the danger in her mind, and was in the exercise of care with reference to this particular defect, but had forgotten it.

He was permitted to show, by her son-in-law and other witnesses, that, after she had testified, she could not tell or remember what she had testified to upon the trial. This testimony was improperly admitted. The following is a sample:—

"Q. State to the jury how her health has been since she was here on Friday. A. In an hour's time after she got home,—after I went home Friday night,—she could not tell what she swore to on the stand.

"Q. How did her physical health appear to be as to whether she was able to sit up? Describe to the jury how she appeared physically. A. She went to bed as soon as she got home, and did n't get up again until the next morning. We took her supper to her. She did not eat but a very little, and she has not been out of her bed but once since.

"Q. What did you say to her in relation to what took place here in court? A. I asked her if she remembered what she said when they asked her whether it was snowing or not. Said she did n't know, could not remember,—did not know as they asked her that question at all. That was about all that we talked about."

This testimony could not have other than a pernicious effect upon the jury, and was inadmissible for any purpose. Consequently the charge of the court, based upon this testimony, was likewise erroneous.

The judgment must be reversed, and a new trial granted.

EVIDENCE — *RES GESTÆ*. — As to what is admissible as part of the *res gestæ*: *Wormsford v. Detroit City Ry Co.*, 75 Mich. 472; *ante*, p. 453, and note; *Lendberg v. Brotherton etc. Co.*, 75 Mich. 84.

MUNICIPAL CORPORATIONS have only such powers as are expressly granted, and such as are necessarily implied therefrom; and the powers given to municipal corporations are strictly construed: *City of St. Louis v. Bell Tel. Co.*, 96 Mo. 623; 9 Am. St. Rep. 370, and note 375.

CORPORATIONS. — The notice given to an officer of a corporation, when acting in the scope of his official capacity, is ordinarily notice to the corporation: *Atlantic Mills v. Indian Orchard Mills*, 147 Mass. 268; 9 Am. St. Rep. 698, and note 708.

MUNICIPAL CORPORATIONS. — As to a city's duty to keep its streets and sidewalks in a safe condition, and its liability for the non-performance of such duty: *Village of Jefferson v. Chapman*, 127 Ill. 438; 11 Am. St. Rep. 136, and note; *City of Anderson v. East*, 117 Ind. 126; 10 Am. St. Rep. 35, and cases in note 39; *Pratt v. Inhabitants of Weymouth*, 147 Mass. 245; 9 Am. St. Rep. 691, and cases in note 697, 698; *Town of Knightstown v. Musgrove*, 116 Ind. 121; 9 Am. St. Rep. 827, and note 831; *Harris v. Township of Clinton*, 64 Mich. 447; 8 Am. St. Rep. 842, and note; compare *Amperes v. City of Kalamazoo*, 75 Mich. 228; *ante*, p. 432, and particularly note 436-438; *Chope v. City of Eureka*, 78 Cal. 588; 12 Am. St. Rep. 113, and note.

MUNICIPAL CORPORATIONS. — As to the liability of a city for damages for personal injuries caused by defective sidewalks: *Village of Ponca v. Crawford*, 23 Neb. 662; 8 Am. St. Rep. 144, and note 149.

MUNICIPAL CORPORATIONS. — As to what is notice, and what notice is required of defects in sidewalks, to render a city liable for injuries caused thereby: *Village of Ponca v. Crawford*, 23 Neb. 662; 8 Am. St. Rep. 144.

NEGLIGENCE IS GENERALLY A QUESTION OF FACT to be determined by a jury: *Bridger v. Ashville etc. R. R. Co.*, 27 S. C. 456; *post*, p. 653, and note 659; *Durbin v. Oregon R. R. & Nav. Co.*, 17 Or. 5; 11 Am. St. Rep. 778, and numerous cases in note 785.

CHADDOCK v. DAY.

[75 MICHIGAN, 527.]

MUNICIPAL CORPORATIONS — ORDINANCE REGULATING TRADE. — The right of property or business cannot be invaded under the guise of police regulations for the benefit of the public health or good order, when it is manifest that such is not the object or purpose of the enactment or ordinance.

MUNICIPAL CORPORATIONS — ORDINANCE IN RESTRAINT OF TRADE. — An ordinance prohibiting the sale of fresh meat on the street in less quantities than one quarter of an animal, without first paying a license fee of ten dollars per month, is excessive, unreasonable, in restraint of trade, and void.

C. R. Wilkes, for the relator.

Pope and Hart, for the respondent.

MORSE, J. Application for *mandamus*. April 17, 1882, the president and board of trustees of the village of Allegan adopted the following by-law, being No. 16 of the by-laws of said village: "It shall not be lawful for any person to sell or offer for sale, on any street in the village of Allegan, any fresh meat of any animal, in pieces or quantities less than one quarter of any such animal, without first paying into the village treasury the sum of ten dollars, in advance, for each month, and obtaining from the clerk a permit for such sale. Any person violating any of the provisions of this by-law shall, on con-

viction thereof, be punished by a fine in a sum not less than fifteen dollars, nor more than twenty-five dollars, or by imprisonment in the county jail for a period not exceeding thirty days."

It is alleged in the petition for *mandamus* that one Charles Schermerhorn, of said village of Allegan, did, on the twenty-sixth day of January, 1889, "go about from place to place, and from street to street, selling fresh meat of beef and swine in pieces and quantities less than a quarter of such animals, on the public streets in said village, contrary to the provisions of said by-law 16."

And that on the eighth day of February, 1889, the relator, as president of said village, made a complaint in writing and on oath before Fayette S. Day, the respondent, a justice of the peace in and for the township of Allegan, in which township the said village is situated, praying for the issuing of a warrant by said justice for the arrest of said Schermerhorn for violating said by-law.

Relator further alleges that the charter of the village requires all prosecutions for violations of the ordinances and by-laws of said village to be brought before some justice of the peace of the said township of Allegan, and authorizes such justice to issue a warrant for the arrest and apprehension of any offender against said by-laws; and that there is no other method of enforcing the provisions of said by-law No. 16, except by complaint and warrant: See secs. 1, 2, art. 30, Act No. 300, Local Laws 1883, pp. 518, 519.

The said justice of the peace refused to entertain said complaint, and refused to issue a warrant.

There are but two justices of the peace residing in said township of Allegan, the respondent and James E. Fuller, and it is shown by the petition for the writ that Fuller was ill, and unable to attend to business.

The writ of *mandamus* is asked to compel the said Fayette S. Day to entertain the complaint against said Schermerhorn for the violation of said by-law, and to issue his warrant for the arrest and apprehension of said Schermerhorn, that he may be apprehended and held to answer said complaint, and further dealt with in relation to the same, as law and justice may require.

The respondent makes answer to the order to show cause, heretofore issued by this court, in which he admits that relator is president of the village of Allegan, and authorized to see

that its ordinances and by-laws are enforced, and that the by-law in question was adopted by the president and trustees of said village; but he alleges that said by-law was never published in any newspaper printed and circulating in said village of Allegan, as required by the charter of said village, it being printed in the form of a supplement to the Allegan Democrat, a newspaper published and circulating weekly in said village, which said supplement, containing only said ordinances and by-laws, was folded in and put in circulation with the regular issues of said newspaper; and he alleges that this method of circulation is not a compliance with the provision of the charter.

He admits that relator made complaint as stated in the petition, and that he refused to entertain said complaint, because he believed, and still believes, that said by-law is illegal and void because the president and board of trustees had no power or authority, under the charter of said village of Allegan, to pass said by-law; and that said by-law is void because it is unreasonable, and in restraint of trade; and that the only object and effect of said by-law No. 16 is to restrain certain persons from selling fresh meat in quantities less than one quarter of an animal, so as to protect those selling at retail in their shops.

He also submits that the by-law is void because not published according to law, as heretofore stated.

He further answers that there has never been any public market fixed or established in said village, and no rule, ordinance, regulation, or by-law has ever been adopted or passed by the board of trustees establishing or regulating a market or markets in said village; and he submits that said by-law No. 16 does not provide for regulating or licensing "hawkers, hucksters, or peddlers" under the power given in the charter of said village, and that its effect is to discriminate unjustly in favor of a certain class of persons in the business of selling fresh meats, and against other persons in the same business, and that said by-law provides for an unjust tax, and not for a license fee.

We do not consider it necessary to determine whether the by-law was properly published under the law.

It is claimed by counsel for the relator that this by-law No. 16 is within the powers granted to the president and board of trustees of the village of Allegan under its charter, and such counsel places it as a by-law regulating and licensing ped-

dlers, and claims that section 2, subdivision 10, article 6, of the charter authorizes them to license and regulate "hawkers, hucksters, and peddlers within the limits of said village, and to require the payment of reasonable license fees."

This subdivision 10 (in connection with section 2) reads as follows: "The board of trustees shall have full power within said village to license and regulate theaters, shows, traveling concerts, auctioneers or auction sales, gift enterprises, hawkers, hucksters, peddlers, and pawnbrokers, or prohibit them from soliciting patronage of the community within the limits of said village, and to require the payment of reasonable license fees."

By an examination of the ordinances and by-laws of the village of Allegan, it appears that the subject of licenses is treated under by-laws Nos. 11 and 19, No. 11 being devoted entirely to auctioneers. But the amount of license fees, and the regulations relative to "hawkers, hucksters, and peddlers," are found entirely within by-law No. 19. Peddlers and hawkers of any articles, except fruit, food, or feed, are charged a license of five dollars per day. Stand licenses are placed at one dollar per day. No license is anywhere required for, or any tax placed upon, the sale of food, except in the case of those selling fresh meats in the quantities, on the street, as mentioned and prescribed in by-law No. 16.

We do not think this by-law can be sustained as a regulation of hawkers or peddlers, as it is evident it was not so intended by its framers. Indeed, it appears to be open to the charge of the respondent that it was passed in the interest of the persons in said village selling fresh meat in shops, and in restraint of trade.

It is quite common in these latter days for certain classes of citizens—those engaged in this or that business—to appeal to the government—national, state, or municipal—to aid them by legislation against another class of citizens engaged in the same business, but in some other way. This class legislation, when indulged in, seldom benefits the general public, but nearly always aids the few for whose benefit it is enacted, not only at the expense of the few against whom it is ostensibly directed, but also at the expense and to the detriment of the many, for whose benefit all legislation should be, in a republican form of government, framed and devised. This kind of legislation should receive no encouragement at the hands of the courts, and be only upheld when it is strictly

within the legitimate power of Congress, or the state or municipal legislatures.

In the present case the argument is strenuously made that the village has the right to regulate the selling of fresh meats, under the authority of subdivision 10, and that such a regulation is not in restraint of trade; that the imposition of the payment of ten dollars monthly is not a tax, but a license, and that it is not in restraint of trade, and the license fee is not unreasonable. The counsel for relator cites a large number of cases in support of his position.

It is conceded that no public market has ever been established in the village, and that there have never been any market regulations, and it is not pretended that by-law No. 16 was intended as a market regulation.

It is not passed under any authority to regulate the use of the public streets, nor yet can it be said to be an exercise of the police power in the interest of the public health. It does not prohibit the sale of fresh meats in the streets, in quantities above the quarter of an animal, and has no reference whatever to the character or condition of the meat sold. It must be sustained, if it can be sustained at all, under the tenth subdivision of section 2 of the charter, heretofore quoted, and the counsel for the relator substantially admits this in his argument.

A sufficient answer to this plea would be that it manifestly was not intended as an exercise of power under this subdivision. It is evident that it was simply an exercise of arbitrary and unauthorized class legislation for the benefit of a few shopkeepers, and an unjust discrimination against those who desired to sell from carts or wagons about the village. It is difficult to perceive how such a by-law could be of public benefit. Its tendency would be, if enforced, to increase the price of fresh meat to the consumer, while it could serve no useful or beneficial purpose, as an offset to this increased cost of an article of daily and necessary food. In almost every case cited by the relator's counsel to sustain this by-law, there was a public market in the village or city, and such a by-law was adjudged valid upon the ground that it was a market regulation: See *Buffalo v. Webster*, 10 Wend. 102; *Bush v. Seabury*, 8 Johns. 418; *Chicago v. Bartee*, 100 Ill. 57; *Rochester v. Pettinger*, 17 Wend. 265; *Nightingale's Case*, 11 Pick. 168.

In *Ash v. People*, 11 Mich. 347, 352, 83 Am. Rep. 740, an ordinance prohibiting persons from keeping a meat market, or

stand outside of the market, without a license, was held valid by a majority of the court, on the ground that the license fee of five dollars a year was a reasonable market regulation for the indemnity of the city for the expense of attending to the supervision of the business at the place licensed; but in the present case there is no market established in Allegan, and consequently no market regulations.

The business engaged in by Schermerhorn is an innocent and useful one, and sanctioned by the general laws of this state; and if it be conceded that the village authorities, under the charter, have a right to exact a license fee as a compensation for the expense of the supervision of the trade, yet the fee proposed to be exacted by by-law No. 16, to wit, ten dollars per month, is excessive and unreasonable, and therefore void.

Nor can it be sustained under any claim of an exercise of the police power for the benefit of the public health, or in the preservation of good order in the community, and there is no showing anywhere in the record that the by-law was passed for the benefit of the health of the people of the village, or in the maintenance of good order. And it is not easy to see how the business of selling meat as carried on by Schermerhorn would be any more prejudicial, either to the health or good order of the community, than if he was selling in a butcher-shop. Nor would the exaction of such a license or tax as the one prescribed in this case be the proper method of police regulation, in case either the public health or order was liable to be imperiled by this method of selling fresh meat. The control and regulation of the business, to guard against either the danger to the health or good order of the community, would, if of any benefit, have to be exercised in other ways than by the imposition of a license fee or tax upon all dealers from carts or wagons alike, without reference to anything save the business they were engaged in, and so heavy as to be in effect a penalty rather than a license.

This by-law, as before said, had its purpose, which was not in the direction of a police regulation, but in restraint of trade. The law will not allow the right of property or business to be invaded under the guise of a police regulation for the benefit of the public health or good order, when it is manifest that such is not the object or purpose of the enactment or by-law: *Austin v. Murray*, 16 Pick. 126.

The by-law in question here, in effect, gives the right to sell

fresh meat to a few in exclusion of all others. It would tend to greatly enhance the price of a necessary article of food, and to compel a loss of time, by forcing all the people of Allegan to resort to the butcher-shops to procure their daily supply. "If all fresh meats may thus be controlled in their sale, all kinds of meats, bread-stuffs, vegetables, and fruits may be brought under the same restriction." If this may be done, the business of selling food would fall into the hands of the few, and all competition outside of the shops and stores would be destroyed, and the people oppressed. Such a by-law is not reasonable, and in this case, the license fee or tax, whichever you may call it, is so extortionate as to make it almost prohibitory: See *Bloomington v. Wahl*, 46 Ill. 489, 494; *Chicago v. Rumpff*, 45 Id. 90; 92 Am. Dec. 196; *Dunham v. Rochester*, 5 Cow. 462; *Barling v. West*, 29 Wis. 307; 9 Am. Rep. 576; *Hayes v. Appleton*, 24 Wis. 542; *Gale v. Kalamazoo*, 23 Mich. 344; 9 Am. Rep. 80; 1 Dillon on Municipal Corporations, sec. 253, 256, 296

The writ must be denied, with costs against the relator.

MUNICIPAL CORPORATIONS — ORDINANCES. — A city must not pass ordinances which operate as an unreasonable restraint of trade, or an unreasonable interference with private business, with respect to the sale of meat, etc.: *Barling v. West*, 29 Wis. 307; 9 Am. Rep. 576; *City of Clinton v. Phillips*, 58 Ill. 102; 11 Am. Rep. 52, and note 54; *Gale v. Village of Kalamazoo*, 23 Mich. 344; 9 Am. Rep. 80; *Caldwell v. City of Alton*, 33 Ill. 416; 85 Am. Dec. 282, and note 286-288; *Bethune v. Hughes*, 28 Ga. 560; 73 Am. Dec. 789; *City of St. Paul v. Laidler*, 2 Minn. 190; 72 Am. Dec. 89; *Chicago v. Rumpff*, 45 Ill. 90; 92 Am. Dec. 196; *Phillips v. Allen*, 41 Pa. St. 481; 82 Am. Dec. 486; but regulations in respect to the selling of meats have relation to health and disease, and when not in restraint of trade, or otherwise unreasonable, are valid: *Kinsley v. City of Chicago*, 124 Ill. 359; *Ash v. People*, 11 Mich. 347; 83 Am. Dec. 740; *Shelton v. Mayor of Mobile*, 30 Ala. 540; 68 Am. Dec. 143.

HUGHES v. RECORDER'S COURT OF THE CITY OF DETROIT.

[75 MICHIGAN, 574.]

MUNICIPAL CORPORATIONS—ORDINANCE IN RESTRAINT OF TRADE.—An ordinance the effect of which is to deprive the producers of market articles of their own raising from selling their produce at first hands to consumers in the principal city market, and to compel them to be sold by holders of stalls at second hand, driving the producers away from the chief market to remote places, is unreasonable, in restraint of trade, and void.

Wisner, Speed, and Harvey, for the relator.

John W. McGrath, for the respondent.

CAMPBELL, J. Relator asks a final writ of prohibition to restrain proceedings against him under what he claims to be an illegal ordinance. An order to show cause was made, and the return shows these facts:—

Prior to April 15, 1889, by chapter 66 of the city ordinances of Detroit, relating to public markets, the public markets of the city of Detroit were, by section 1, defined as including the Cass market, which is a small triangle between Adams, Cass, and Grand River avenues, and the Central market, which includes a space fifty feet wide, extending from the Campus Martius to Randolph Street, crossed by Bates Street. This section remains unchanged, and the Central market is the one referred to in our decision in the case of *Attorney-General v. City of Detroit*, 71 Mich., where it was held the city of Detroit could not destroy or impair it.

By section 11 of said chapter it was provided that farmers and gardeners selling and offering for sale from their vehicles the vegetable and other products of their own raising should occupy and stand with such vehicles on the two markets before named, and the eastern and western hay markets, and by section 12 it was ordained that persons other than farmers and gardeners offering for sale similar articles from their vehicles should occupy and stand at the two hay markets.

On the 5th of April, 1889, an amendment was adopted to section 11, prohibiting sales of any articles on the Central market except from stalls or stands leased or occupied by the sellers, and confining farmers and gardeners with their vehicles to the Cass and hay markets.

Relator is a gardener who has heretofore sold his produce from his vehicle on the Central market. Having attempted to do so after the passage of the amended ordinance, he was

prosecuted in the recorder's court. It appears from the return that a suit is pending in chancery, brought by the attorney-general against the city of Detroit, to enjoin the city from enforcing the ordinance as illegal, and as being within the scope of our former decision on the duty of the city concerning the Central market. The injunction granted seems to have been dissolved, and the city authorities seem to be continuously instituting prosecutions, and not disposed to wait for a determination of the chancery suit.

The direct and only apparent effect of this ordinance as amended is to deprive the producers of market articles of their own raising from selling their produce at first hands to consumers in the principal city market, and to compel them to be sold by holders of stalls at second hand, driving the producers away from the chief seat of market business to remote places, which do not seem to be any more adequate for the accommodation of their vehicles than the Central market.

In the cases of *Henkel v. Detroit*, 49 Mich. 249, 43 Am. Rep. 464, and *Attorney-General v. City of Detroit*, before referred to, the importance of markets as furnishing means of direct communication between purchasers and producers was fully discussed, and this feature was treated as essential to the character of a general market. A city has no right, and the city has never been empowered, to shut out the producers of fresh provisions and similar farm and garden articles from having convenient access to consumers. The return is disingenuous in attempting to conceal the fact that the ordinance does not—as is evidently meant to be understood—merely change the location of sales and not diminish the facilities. But it in fact shuts out farmers and gardeners from the principal market, and gives no substitute for it. The purpose is too obvious to be covered up, and in reading the ordinance before and after amendment, it is not even plausibly concealed. The power to prevent and punish forestalling would have nothing to operate on if people who raise their own market products can be dealt with in this way. An essential feature of a market such as we have held the Central market to be cannot be wiped out in this way.

We do not think it worth while to open and rediscuss what has been heretofore fully enough laid down, as often as the obstinacy of city officials persists in subjecting parties to litigation and the city treasury to its expenses. The attempt made to change the ordinance, and, in doing so, to disregard

the decisions already made by this court, cannot be sustained, and the amendment must be held void. It follows that there can be no prosecution under it. It would be vexatious and unjust in so clear a case, where delay will destroy the season's business, to turn over parties to submission to wrong or to the expense of the multifarious and persecuting prosecutions which it is evident the city officials have been disposed to set in motion. The case is proper for restraint by prohibition, and the order for a writ will be made absolute, with costs against the city.

It may not be out of place to suggest that a decree of this court is meant to be obeyed.

MUNICIPAL CORPORATIONS. — As to ordinances regulating and limiting markets and the sale of meats and produce in cities: Extended note to *Caldwell v. City of Alton*, 85 Am. Dec. 286-289; *Chaddock v. Day*, 75 Mich. 527; *ante*, p. 468, and cases collected in note 474.

CASES
IN THE
SUPREME COURT
OF
NEBRASKA.

GRAND ISLAND BANKING COMPANY v. FREY.

[25 NEBRASKA, 66.]

CHATTEL MORTGAGE — REMOVAL OF CHATTELS — CONSTRUCTIVE NOTICE. —

A chattel mortgage which is filed in the county clerk's office of the county in which the mortgagor is residing at the time of its execution is constructive notice of the existence of such mortgage in that county, and in any county to which the mortgagor may remove the mortgaged property.

LIEN OF VALID CHATTEL MORTGAGE ON MACHINERY CANNOT BE DIVESTED
by attaching such machinery as a fixture in a roller mill.

ACTION to foreclose chattel mortgage. The opinion states the case.

O. A. Abbott, for the appellants.

Ledwich and Elliott, and Hazlett and Bates, for the appellees.

MAXWELL, J. This action was brought in the district court of Custer County, to foreclose a chattel mortgage on certain mill machinery, which constituted the motive-power of the mill operated by the Broken Bow Roller Milling Company.

The facts, as shown by the evidence, are, in substance, as follows: John G. Schaupp and Son were, during the year 1885, the owners of and operating an extensive flouring-mill at Grand Island, known as Planet Roller Mills; the plaintiff was their banker, to whom they then owed about thirteen thousand dollars. To secure this indebtedness, and future advances, they made a mortgage on the mill property for ten thousand dollars. Afterwards a doubt arose as to whether

the machinery in the mill was covered by the real estate mortgage, and a chattel mortgage was taken to secure two notes of five thousand dollars each, being a part of the actual indebtedness. The real estate mortgage was recorded in Hall County, and the chattel mortgage filed therein according to law. About June 4, 1886, the mill was destroyed by fire, which damaged the engines and machinery. At the time of the fire, the actual indebtedness of Schaupp and Son to the plaintiff was about seventeen thousand dollars. The real estate mortgage was foreclosed, property sold, and the proceeds credited on the indebtedness. Sundry other payments, together with the money received from the insurance on the mill, were also applied to this debt, thus reducing it to a sum amounting, at the time of the trial, to about four thousand dollars. Soon after the fire, the bank and Schaupp and Son were offered two thousand dollars for this burned machinery. Mr. Schaupp, Sen., not thinking this a good offer, and the bank desiring to accept, something was said at the time to the effect that Schaupp could have all he could get out of it in excess of two thousand dollars, or that the bank would release the mortgage for two thousand dollars. Mr. Frey, one of the defendants, was, at this time, engaged in the erection of a mill at Broken Bow, and he and Mr. Schaupp, Sen., entered into an agreement whereby Mr. Schaupp agreed to supply an engine and boiler to operate the mill, and put in some money.

Mr. Frey testifies that he knew this boiler and engine were to come from the ruins of Schaupp and Son's burned mill. Soon after this, Mr. Schaupp caused some of the mortgaged property to be shipped direct to Broken Bow, and some to be sent to Allis & Co., at Milwaukee, for repairs, and to be shipped after this to Broken Bow, where it arrived about Christmas, 1886, and was placed in position in the mill before the 29th of December, 1886, on which day a copy of plaintiff's mortgage was filed in the office of the county clerk of Custer County. Mr. Frey paid the freight on the machinery to Broken Bow, and became liable personally for the repairs on the engine, and Mr. Schaupp failed to keep his engagements with him, and Frey assumed entire control. Mr. Frey afterwards sold the mill and machinery to Mr. Collman. The Broken Bow Roller Milling Company was then organized, with Mr. Inman, Frey, Collman, and Lorengan as its stockholders and officers. The property was conveyed by Collman

to the Broken Bow Milling Company on or about March 29, 1887. Mr. Frey and Mr. John G. Schaupp had a settlement, and Mr. Schaupp signed a release of all his interest in the machinery in question to Mr. Frey for the sum of fifty dollars. The following is a copy of the receipt:—

“BROKEN BOW, NEB., April 15, 1887.

“Received of George W. Frey, Esq., fifty dollars, the receipt of which is hereby acknowledged, in full for all work done, material furnished of whatever description and character, and also in full for all claims John G. Schaupp may have or had against the said George W. Frey or against the mill property, both personal and real estate, located on lots 4 and 5, block 102, of railroad addition to Broken Bow, Nebraska. In witness whereof, said John G. Schaupp has hereby signed his name this thirteenth day of April, 1887.

“JOHN G. SCHAUPP.

“In presence of O. J. Collman.”

Mr. Schaupp testifies that he only sold his own interest in the machinery, and that he never represented the bank; that its claim was not mentioned at the time.

Frey and the milling company defend against the action, on the ground,—1. That they are innocent purchasers, without notice of the bank's claim under the mortgage; 2. That Schaupp had a right to sell the property and release the bank's claim, and that the receipt above set out has that effect; 3. That the property has become affixed to the land, and is now real estate, and the plaintiff's claim is lost thereby.

The defendants have paid nothing for the machinery in question except the above sum of fifty dollars. Mr. Schaupp, Sen., in his testimony, estimates the value of the machinery in controversy at fourteen hundred dollars, while Mr. Frey places it at not to exceed five hundred dollars. The claim of the plaintiff is shown to be *bona fide*, and Mr. Schaupp is actually indebted to it on the chattel mortgage in question for considerably more than the value of the mortgaged property in controversy. The claim of the milling company that they had secured a release of the mortgage lien for the sum of fifty dollars bears upon its face the stamp of want of good faith. The mortgage, being duly filed in the office of the county clerk of Hall County, where the mortgagor resided at the time of execution of the mortgage, was constructive notice in that county and in whatever county Schaupp might remove the

mortgaged property: *Cool v. Roche, Hall, and Ray*, 20 Neb. 550; *Whitney v. Heywood*, 6 Cush. 82; *Barrows v. Turner*, 50 Me. 127; *Hick v. Williams*, 17 Barb. 523; *Kanaga v. Taylor*, 7 Ohio St. 134; 70 Am. Dec. 62; *Smith v. McClean*, 24 Iowa, 822. The mortgage, therefore, was constructive notice to the defendants in Custer County, and this, too, without the filing of the copy in such county. In addition to the constructive notice it is evident that Mr. Frey, if not other members of the milling company, had actual notice of the existence of such mortgage before the payment of fifty dollars to Schaupp. The filing of such copy, however, did not impair the plaintiff's right, nor can the attaching of the machinery as a fixture in the mill defeat the plaintiff's lien. The milling company, therefore, is liable to the plaintiff for the value of the machinery in question. This value, however, we are unable to determine from the proofs before us, and the cause must be remanded to take further testimony on that point, and for an appropriate judgment of the court below.

The judgment of the district court is reversed, and the cause remanded for the purposes herein indicated.

NOTICE BY REGISTRATION. — As to what notice is constructively imparted by records: Note to *Parker v. Conner*, 45 Am. Rep. 188-190; *Chamberlain v. Bell*, 7 Cal. 292; 68 Am. Dec. 260; *Sowden v. Craig*, 26 Iowa, 156; 96 Am. Dec. 125. The registration of a mortgage in one record-book, and the registration of a duly executed and acknowledged assignment of such mortgage in another record-book, when the proper cross-references appear connecting the two records, is a good and valid registration, having the same effect as if the mortgage and assignment had both been recorded together in the same book: *Soule v. Corbley*, 65 Mich. 109. Deeds by foreign administrators to lands in Missouri must be recorded in the county where such land is situated: *Keith v. Keith*, 97 Mo. 223.

REGISTRATION — NOTICE. — When an instrument entitled to be recorded is filed with the proper officer for record, it becomes constructive notice from the date of such filing: *Throckmorton v. Price*, 28 Tex. 606; 91 Am. Dec. 334; *Hoffman v. Mackall*, 5 Ohio St. 124; 64 Am. Dec. 637, and cases cited in note thereto; *Monaghan v. Longfellow*, 81 Me. 296.

REGISTRATION. — INSTRUMENTS WHICH ARE REQUIRED TO BE RECORDED must be recorded in the county designated by statute for the record of instruments affecting the lands therein mentioned: *Alford v. Jones*, 71 Tex. 519.

REGISTRATION OF MORTGAGES — REMOVAL OF MORTGAGED PROPERTY INTO ANOTHER STATE. — As to the equitable and statutory protection given a mortgagee under a valid mortgage which has been duly recorded when the mortgaged property has been removed out of the state: Note to *Kanaga v. Taylor*, 70 Am. Dec. 67, 72. Recording a second mortgage upon a cotton crop is notice to a first mortgagee who subsequently advances money to save

the crop to an amount in excess of that secured by his mortgage: *Weatherbee v. Farrar*, 97 N. C. 106. A duly recorded mortgage upon a growing crop in the county in which the lands lie is constructive notice of the existence of such mortgage, even to a purchaser in an adjoining county: *Hudmon v. Du Bose*, 85 Ala. 446. In Texas, a chattel mortgage is valid without acknowledgment, and depositing it with the county clerk in his office complies with the statute fully: *Hicks v. Ross*, 71 Tex. 356.

FREMONT, ELKHORN, AND MISSOURI VALLEY RAILROAD COMPANY v. MARLEY.

[25 NEBRASKA, 128.]

REASONABLE TIME TO ANSWER AND PREPARE FOR TRIAL SHOULD BE GIVEN, WHEN. — Where, just before going to trial, it is discovered that the files have been mislaid and cannot be found, and the court thereupon permits the plaintiff to file a substituted petition which is much broader than the one for which it is filed, and which in fact raises new issues in the case, the defendant should be given a reasonable time in which to answer and prepare for trial, and it is error to compel the defendant, under such circumstances, to answer the substituted petition and go to trial at once.

WITNESS NOT PERMITTED TO TESTIFY AS TO AMOUNT OF DAMAGES SUSTAINED, WHEN. — On the trial of an action to recover damages for an injury to growing crops, a witness who possesses the requisite knowledge may testify as to the value of the crops destroyed, or if only partially destroyed, the extent of the injury; but he cannot be permitted to testify directly as to the amount of the damages sustained. That question is one for the jury to determine upon the evidence.

ADMISSION OF RECORDS TO ESTABLISH TITLE, IN DISCRETION OF COURT, WHEN. — In an action for injury to growing crops and to the land, the question of the admission of records to establish the plaintiff's title is, to a great extent, one for the trial court, and unless there is a clear abuse of discretion, its judgment will not be reversed on that ground.

INTEREST ON VALUE OF PROPERTY DESTROYED BY NEGLIGENCE ALLOWED, WHEN. — The owner of property destroyed by the negligence of another is entitled to interest on the value of such property from the time of its destruction.

OWNER OF GROWING CROPS DESTROYED BY FAULT OF ANOTHER MAY RECOVER the value thereof in an action against the person through whose negligence they were destroyed.

PARTY HAS NO RIGHT TO COLLECT SURFACE WATER AND DISCHARGE IT on land of another, to his damage, and if he does so, he will be liable for the damage sustained.

ACTION for damages. The opinion states the case.

John B. Hawley, for the plaintiff in error.

G. M. Cleveland, M. F. Harrington, and Allen and Robinson, for the defendant in error.

MAXWELL, J. This action was brought by the defendant in error against the plaintiff in error, in the district court of Holt County, to recover damages to crops, etc. A petition was filed, and also an amended petition, and just before going to trial it was discovered that the files were mislaid, and after a prolonged search, as they could not be found, the attorneys for the plaintiff below obtained leave to substitute a petition, which they did as follows:—

“That defendant is now, and was at the date of the various transactions hereinafter mentioned, a railroad corporation, organized and doing business under the laws of the state of Nebraska, in Holt County, Nebraska; is owning and operating therein a line of railway in the corporate name above stated; that this plaintiff is, and since the year 1873 has been, the owner, and as such rightfully possessed, of the south half of the northeast quarter and the east half of the northwest quarter of section 29, township 28, range 10, in Holt County, Nebraska; that in the year 1881 the said defendant graded and constructed on its right of way, through Holt County, Nebraska, a railroad track running from the southeast to the northwest, and within about thirty rods of the said real estate of the plaintiff, over which it now and ever since then has maintained and operated a railroad; that at the time of constructing the road-bed and grading its said track, the defendant cut ditches on its right of way on either side of its track in the close vicinity of the plaintiff’s said land, to drain its track and right of way of surface water, and to discharge said surface water accumulating from time to time along its said track and right of way; that to the west and southwest of the plaintiff’s said land the surface of a large tract of land along the defendant’s said track and right of way is such as to cause all of the surface water accumulating thereon to flow into the said ditches dug and maintained on either side of the said defendant’s railway track, and especially into the ditch on the south side thereof, which water, after reaching said ditches, flows therein in a southeasterly direction, and toward the said land of the plaintiff; that by reason of the embankment of defendant’s road-bed, and the insufficiency of the said ditches along the defendant’s right of way, large quantities of surface water is directed from its natural course and carried down to a point opposite plaintiff’s said land, where it is discharged in large volumes upon the plaintiff’s said land. The plaintiff alleges that the embankment of defendant’s said road-bed was

so negligently and insufficiently made and maintained by defendant, the culverts and ditches so negligently and insufficiently constructed and maintained by defendant, that said ditches do not and never have properly carried off and discharged the surface water accumulating therein, but on the contrary, the said water has been poured out of said ditches and across and over the land of the plaintiff; that on or about the twentieth day of April, 1882, by reason of the careless, negligent, and insufficient manner in which the defendant's said road-bed, ditches, and culverts were constructed and maintained, and without any fault or neglect of the plaintiff, a large quantity of surface water was negligently suffered to accumulate by defendant in said ditches, and on the defendant's said right of way and road-bed, and was discharged upon the said land of the plaintiff, drowning five head of cattle of the plaintiff, of the value of one hundred dollars, and fifteen hogs of the plaintiff, of the value of seventy-five dollars; that said sums are now due and owing to the plaintiff from the defendant, and are wholly unpaid; that on or about the twentieth day of May, 1882, by reason of the careless and negligent and insufficient manner in which the defendant's said road-bed, ditches, and culverts were constructed and maintained, and without any fault or neglect of the plaintiff, a large quantity of surface water was negligently suffered to accumulate by defendants in said ditches, and on defendant's said right of way and road-bed, and was discharged upon the said lands of the plaintiff, and destroying eight acres of standing and growing oats, of the value of forty dollars, which sum is now due and unpaid to him; that some time in the month of June, 1882,—the exact time the plaintiff is unable to state,—by reason of the careless, negligent, and insufficient manner in which said road-bed, culverts, and ditches of defendant were constructed and maintained, and without any fault or neglect of the plaintiff, a large quantity of surface water was negligently suffered to accumulate by said defendant in said ditches, and on defendant's said right of way and road-bed, and was discharged upon said lands of the plaintiff, destroying seven acres of standing and growing corn thereon, of the value of thirty-five dollars, which sum is now due plaintiff from defendant, and wholly unpaid.

"The plaintiff further alleges that, some time in the month of May, 1883,—the exact time the plaintiff is unable to state,—by reason of the careless, negligent, and insufficient manner in which the defendant's said road-bed, ditches, and

culverts were constructed and maintained, and without any fault or neglect of the plaintiff, a large quantity of surface water was negligently suffered by defendant to accumulate in said ditches, and on the defendant's right of way and road-bed, and was discharged upon the said lands of the plaintiff, flooding the surface of a great portion thereof, and washed out and destroyed the plaintiff's cattle-yards, sheds, fences, and the like, and washing gullies and ditches in the plaintiff's said land, to the damage of the plaintiff in the sum of two hundred dollars, which amount is now due and unpaid from the defendant to the plaintiff; that some time in April, 1883, and July, 1883, and at divers other dates in said year, — the exact times the plaintiff is unable to state, — by reason of the careless, negligent, and insufficient manner in which the defendant's said road-bed, ditches, and culverts were constructed and maintained, and without any fault or neglect of the plaintiff, a large quantity of surface water was negligently suffered to accumulate by defendant in said ditches, and on defendant's right of way and road-bed, and was discharged upon the lands of the plaintiff, and flooded the same, and destroyed hay of the value of fifty dollars, damaged corn to the amount of one hundred dollars, and destroyed five acres of oats of the value of twenty-five dollars, being on plaintiff's land and his property, which sums are now due and owing to him from said defendant therefor; that at divers and sundry times in the year 1884, — the exact dates the plaintiff is unable more fully to state, — by reason of the careless, negligent, and insufficient manner in which the defendant's said road-bed, ditches, and culverts were constructed and maintained, and without any fault or neglect of the plaintiff, a large quantity of surface water was negligently suffered to accumulate by the defendant in said ditches, and on the defendant's said right of way and road-bed, was discharged upon the said land of the plaintiff, flooding the same, and destroying fifteen acres of wheat, four acres of oats, five acres of corn, and fifteen tons of hay, of the value of three hundred and thirty dollars, being on said land, and being the property of the plaintiff, to the damage of the plaintiff in the sum of three hundred and thirty dollars, which sum is now due and unpaid.

“That the said several acts of flooding the lands of the plaintiff, as hereinbefore stated, have had the effect of washing away much of the valuable surface of the plaintiff's said land, and washing deep gullies and ditches therein, to the great

damage of the plaintiff, to wit, to his damage in the sum of five hundred dollars, which sum is now due the plaintiff from the defendant, and wholly unpaid.

"That the said several items of damage hereinbefore mentioned and stated occurred in consequence of the negligent, unskillful, and insufficient construction and maintenance of the said defendant's said road-bed, ditches, and culverts, and without any fault or neglect of the plaintiff."

The railway company was compelled to answer at once and proceed to trial. The substituted petition is much broader than the amended one, for which it was filed, and, in fact, raised new issues in the case. The railway company filed a motion for a continuance, supported by an affidavit, but the motion was overruled, to which exceptions were duly taken. As the substituted petition raised new issues, the railway company should have had a reasonable opportunity to prepare to meet them; otherwise, it might be deprived of the means of making its defense. It was not necessary, however, to continue the case to the next term, but a reasonable time should have been given in which to answer and prepare for the trial. The court, therefore, erred in compelling the defendant below (the plaintiff in error) to answer the substituted petition and go to trial at once.

2. The second ground of objection is, that the court permitted the plaintiff and other witnesses to give their opinion as to the amount of damages sustained by the plaintiff in consequence of the overflow of his land. The general rule is, that witnesses must speak as to facts, and facts, too, within their own knowledge. Opinions, belief, deduction from facts, and the like, are matters which belong to the jury, and by which they arrive at their verdict. On the trial of the question of damages for an injury to growing crops, the witnesses should be confined to the statement of facts showing the injury; they may be asked questions as to the crops, their value, and the particular injuries done to them, and the extent of such injuries, and may state all the facts in their possession, from which the jury may determine the question of the amount of damages: *Burlington etc. R. R. Co. v. Schlunts*, 14 Neb. 423; *Republican V. R. R. Co. v. Arnold*, 13 Id. 486; *Evansville etc. R. R. Co. v. Fitzpatrick*, 10 Ind. 120; *Farrand v. Chicago etc. R. R. Co.*, 21 Wis. 435; *Lincoln v. Saratoga etc. R. R. Co.*, 23 Wend. 425; *Alabama etc. R. R. Co. v. Burkett*, 42 Ala. 83; *Harrison v. Iowa etc. R. R. Co.*, 36 Iowa, 323. In other words, a

witness who possesses the requisite knowledge may testify as to the value of the crops destroyed, or if only partially destroyed, the extent of the injury; but he cannot be permitted to testify directly as to the amount of damages sustained. That question is one for the jury to determine upon the evidence. It is doubtful, however, whether objections were made to the testimony in the court below in such form as to be available in this court.

3. The third objection is, that the court permitted the plaintiff below to introduce in evidence, from the county records of Holt County, a copy of the final certificate of entry by the plaintiff of the lands described in the petition.

The plaintiff below in this case had already testified, without objection, that he was the owner of the land in question, and in the possession thereof. The question of the admission of records to establish title is, to a great extent, one for the trial court, and unless there is a clear abuse of discretion, its judgment will not be reversed on that ground. There appears to have been no doubt of the title of the plaintiff below, or that he was in possession at the time of the alleged injuries. The defendant below, therefore, sustained no injury by the ruling of the court.

4. The fourth ground of objection is, in substance, that the court erred in directing the jury that they might allow interest on the damages sustained by the plaintiff. This we think was a correct instruction. If the plaintiff below had sustained loss of property through the fault of the railroad company, it certainly would be only justice that he should be paid for such loss as soon thereafter as the amount thereof could be ascertained. If the company failed to pay, then it should pay for the use of the money. The plaintiff, therefore, if entitled to damages, was entitled to interest thereon.

5. Some objection is made that growing crops have no market value, and that therefore the court erred in instructing the jury that "they should consider the fair market value of all personal property and crops destroyed or injured, if any, belonging to him," etc. This instruction was properly given. Growing crops have a value, and when destroyed by the fault of another, the owner is entitled to compensation therefor. The court did not err in giving this instruction.

The railway company asked the court to give the following instruction: "In this case, the plaintiff brings suit for dam-

ages in consequence of the diversion of surface water by the defendant, and cannot recover."

The instruction asked was properly refused. A party has no right to gather up surface water and discharge it on the land of another, to his damage: *Davis v. Londgreen*, 8 Neb. 43; *Pyle v. Richards*, 17 Id. 181; *Stewart v. Schneider*, 22 Id. 286.

The question was before the supreme court of Michigan in *Gregory v. Bush*, 64 Mich. 37, 8 Am. St. Rep. 797, where it is said, that "one has a right to ditch and drain and dispose of the surface water upon his land as he sees fit; but he is not authorized to injure by so doing the heritage of his neighbor. He cannot collect and concentrate such waters, and pour them through an artificial ditch in unusual quantities upon his adjacent proprietors: *Kauffman v. Griesemer*, 26 Pa. St. 407; 67 Am. Dec. 437; *Barkley v. Wilcox*, 86 N. Y. 148; 40 Am. Rep. 519; *Noonan v. City of Albany*, 79 N. Y. 476; 85 Am. Rep. 540; *Adams v. Walker*, 34 Conn. 466; 91 Am. Dec. 742." This we think is a correct statement of the law.

For the error in not allowing a reasonable time after the filing of a substituted petition in which to answer and prepare for trial, the judgment of the district court is reversed, and the cause remanded for further proceedings.

SURFACE WATER. — A land-owner cannot by artificial drains or ditches collect waters and cast them upon the proprietor below: *Gregory v. Bush*, 64 Mich. 37; 8 Am. St. Rep. 797, and note 803; *Sullens v. Chicago etc. Ry Co.*, 74 Iowa, 659; 7 Am. St. Rep. 501.

INTEREST, AS TO THE ALLOWANCE OF, IN GENERAL: See note to *Van Rensselaer v. Jewett*, 51 Am. Dec. 277, 278; *Coburn v. Goodall*, 72 Cal. 496; 1 Am. St. Rep. 75, and note 83; *Cox v. McLaughlin*, 76 Cal. 60; 9 Am. St. Rep. 164, and note 173. A judgment for personal injuries, whether it arises *ex contractu* or *ex delicto*, does not carry interest: *McMurtry v. Kentucky C. R. R. Co.*, 84 Ky. 462.

APPELLATE PRACTICE. — Matters which are left to the discretion of the trial court will not be reviewed upon appeal, unless such discretion has undoubtedly been abused: *Sharon v. Sharon*, 77 Cal. 102; *Westheimer v. Cooper*, 40 Kan. 370; *Andrews v. Warner*, 87 Tenn. 1; *Pacific Roller Mill Co. v. Telegraph Hill Co.*, 79 Cal. 340; *Minturn v. Bliss*, 77 Id. 90; *Hornady v. Shields*, 119 Ind. 201; *Burch v. Adams*, 40 Kan. 639.

OPINIONS AS EVIDENCE. — Ordinarily, when the facts upon which an opinion is based can be stated and described, the opinions of the witness are not admissible, because the jury can as easily form opinions as the witness: *Whittier v. Franklin*, 46 N. H. 23; 88 Am. Dec. 185. As to opinion evidence generally, see extended note to *Baltimore etc. Co. v. Cassell*, 59 Am. Rep. 176-186. Expert testimony is always inadmissible upon questions which the jury can readily decide for themselves: *Stumore v. Shaw*, 68 Md. 11; 6 Am. St. Rep. 412, and note 417; but when the witness is shown to possess peculiar personal

knowledge about the matter under consideration, which ordinary persons do not possess, the jury may be entitled to his opinions in reference thereto: *Butterfield v. Frank*, 63 Mich. 155. So a woman who was accustomed to pass over a railroad track, where a flag-man was stationed, from one to six times daily, may state that she knew what was the signal "to go on" given by such flag-man, and that at the time in question he gave such signal: *Buchanan v. Chicago etc. R'y Co.*, 75 Iowa, 393. Opinions of witnesses are inadmissible as to the meaning of a telegram: *Pennsylvania R. R. Co. v. Conwell*, 127 Ill. 420. Railroad company must ordinarily compensate the land-owner, or his tenant in possession, for any crops which have been damaged or destroyed by reason of the location of its line of railroad over and through his land: *Lafferty v. Schuykill etc. R. R. Co.*, 124 Pa. St. 297; 10 Am. St. Rep. 587.

WINTERS v. MEANS.

[25 NEBRASKA, 241.]

IN ACTION TO ENJOIN JUDGMENT, NATURE OF DEFENSE IN THE ORIGINAL ACTION MUST BE PLEADED. — In an action to enjoin a judgment, it is not sufficient for the plaintiff to allege that he has a defense to the action in which the judgment was rendered, but he must state the general nature of his defense, so that the court can judge of its sufficiency.

SERVICE OF SUMMONS ON MANAGING MEMBER OF PARTNERSHIP, where one of the members of the firm is absent from the state, is sufficient to sustain a judgment against the property of the firm.

APPEARANCE OF ATTORNEY, IF UNAUTHORIZED, IS GROUND FOR VACATING JUDGMENT. — Where the court acquires jurisdiction of an action solely by the appearance of an attorney, the party for whom the appearance was made may deny the authority of such attorney, and if the appearance was unauthorized, vacate the judgment. But the want of authority must be clearly made to appear, in order to warrant the court in vacating the judgment.

. **ACTION** to enjoin a judgment. The opinion states the case.

O. A. Abbott, for the appellant.

John Dawson, and Dilworth, Smith, and Dilworth, for the appellee.

MAXWELL, J. This is an action to enjoin a judgment. On the trial of the cause, judgment was rendered in favor of the plaintiff. The defendant appeals.

The plaintiff alleges in his petition "that on the twenty-second day of June, 1880, the defendant recovered a judgment in the district court of Adams County, Nebraska, against W. L. Smith, John J. Worsick, Charles Wells, George Wells, and Henry P. Handy, and this plaintiff, for the sum of \$22,691 and costs, taxed at \$39; that this plaintiff was never served with summons in said action, and never appeared therein,

personally or by attorney, and plaintiff never had any notice of said judgment or the proceedings in said cause until the twenty-fourth day of July, 1886; that said judgment is unjust, and if plaintiff ever had had notice of the pendency of said action, he would have had a complete defense to said action; that at the commencement of said action he was not a partner of said W. L. Smith, John J. Worsick, Charles Wells, George Wells, and Henry P. Handy, or either of them, and was never indebted to said John L. Means, or concerned in the transaction, and the plaintiff was never indebted to the defendant on the claim on which said action was founded in said cause."

The defendant, in his answer, "admits that on or about the twenty-second day of June, A. D. 1880, he, the said defendant, recovered a judgment in the district court of said Adams County, in a certain action then pending in said court, wherein he, the said John L. Means, was plaintiff, and the firm of Smith & Co., consisting of W. L. Smith, Leroy S. Winters, John J. Worsick, Henry P. Handy, Charles Wells, and George Wells, were defendants, in the sum of \$22,691, his debt and damages, and the costs, taxed at the sum of \$39, which said suit is the same suit and proceeding referred to in said plaintiff's petition herein. Said defendant denies that said Leroy S. Winters was not a member of said firm of W. L. Smith & Co. at the time of the contracting of the obligation sued on, or at the time of the commencement of said suit, as alleged in said plaintiff's petition, and denies that said Leroy S. Winters had no notice of the pendency of said suit; denies that said Leroy S. Winters did not appear in said suit; denies that said judgment is unjust, or that at the date of the rendition thereof said Leroy S. Winters had any defense thereto; denies that said Leroy S. Winters is not indebted to this plaintiff.

"2. Said defendant, further answering the petition of said plaintiff, and by way of a cross-petition, alleges that said plaintiff, Leroy S. Winters, is the same Leroy S. Winters who was a member of the said firm of W. L. Smith & Co., and that the judgment heretofore referred to against said firm of W. L. Smith & Co. is now in full force, and wholly unpaid, unsatisfied, and unreversed; that he has caused execution to be issued thereon from time to time, and which executions have been returned unpaid and unsatisfied for want of property wherewith to satisfy the same; that the said firm of W. L. Smith & Co. is wholly insolvent, and has been insolvent

and unable to pay its honest debts ever since the rendition thereof. Defendant further alleges that the said Leroy S. Winters knew of the pendency of said suit, and employed attorneys therein, as well on his own behalf as on behalf of the firm of W. L. Smith & Co.; that said judgment is a valid and subsisting obligation against the said Leroy S. Winters, and against said W. L. Smith & Co."

The reply is a general denial. The record shows that the action against W. L. Smith & Co. was continued for two terms of the district court, in order to allow amended petitions to be filed; that a firm of attorneys at Hastings appeared for all the defendants in that action, and the court so finds. To the last amended petition in that case no answer was filed, and judgment was taken against W. L. Smith & Co. by default.

The plaintiff seeks to avoid the judgment upon two grounds: 1. That he was not served with summons; and 2. That he did not appear by attorney.

In his petition he does not allege that he was not a member of the firm of W. L. Smith & Co. at the time the contract with the defendant was entered into, while his own testimony clearly shows that he was such partner at that time. He denies that he is indebted to the defendant on the claim upon which a judgment was recovered, and says he has a defense. This defense may be, and probably is, the statute of limitations. He should have stated the general nature of his defense, so that the court could judge of its sufficiency. It is very clear that the petition fails to state a case for equitable relief, to the extent of enjoining the judgment. Nor will the testimony warrant the court in granting an injunction against the entire judgment. The testimony shows that the plaintiff was a member of the firm of W. L. Smith & Co. on the fifteenth day of April, 1874, on which day the contract was entered into, and continued as a member of such firm until June 5th of that year, when he sold out his interest therein. There is no pretense that the defendant knew of the plaintiff's sale of his interest, or that he in any way gave his assent thereto. If the testimony of the defendant is to be believed, he had a large part of the contracts completed at the time the plaintiff is alleged to have sold his interest in the firm business. The plaintiff, as a member of the firm of W. L. Smith & Co., had entered into a contract with the defendant, and was bound to perform on his part. He could not release himself, therefore, by simply withdrawing from the firm or selling out his inter-

est therein. A party who dealt with him as partner had a right to suppose that he would continue to be such until he had notice, either actual or constructive, of the dissolution of the firm.

2. Where an action is brought against a firm in the individual names of its members, the summons should be served on all the partners. Where, however, one of the partners is absent from the state, so that the service cannot be made on him, service upon the other members will be allowed: *Leess v. Martin*, L. R. 13 Eq. 77; *Carrington v. Cantillon*, Bunb. 107; *Coles v. Gurney*, 1 Madd. 187; 1 Lindley on Partnership, Elwell's 2d ed., 172. Such service is sufficient, at least, to subject the partnership property of the firm to the payment of the debt. It does appear in this case that the plaintiff was absent from the state when service of process was made on W. L. Smith & Co., and that service was made on Smith, the member in charge of the business. Such service is sufficient to sustain a judgment against property of said firm.

3. Where the court acquires jurisdiction solely by the appearance of an attorney, the party for whom the appearance was made, may, no doubt, deny the authority of such attorney, and if the appearance was unauthorized, vacate the judgment. The want of authority, however, should be clearly made to appear, and particularly is this the case where the action is against a firm, one of whose members long afterwards seeks to escape liability, on the ground of want of such authority. The proof on this point is not satisfactory, and does not clearly show want of authority. It is apparent that the judgment cannot be enjoined except upon equitable considerations, which do not appear in the record. The judgment of the district court is reversed, and the cause remanded, with leave to the plaintiff to file an amended petition in thirty days, stating in full the defenses upon which he relies to defeat the judgment.

PARTNERSHIP. — As to the service of process upon only one of several partners, see extended note to *Wood v. Watkinson*, 44 Am. Dec. 570-574. A judgment rendered in an action brought against a partnership is not binding upon a partner who was not served with process, and who did not waive process by appearance: *Golden State etc. Iron Works v. Davidson*, 73 Cal. 389. Where an action is properly brought against a partnership, but service of summons cannot be had personally upon the partners, they may be served by publication; but in an action against a firm by its firm name, the summons may be served by leaving a copy at its usual place of business in the county with a member of the firm, or with the clerk or general agent of such

firm: *Rosenbaum v. Hayden*, 22 Neb. 744. In a suit against a firm for a firm debt, it is error to render judgment against one partner alone: *Craig v. Smith*, 10 Col. 220.

JUDGMENTS BASED ON UNAUTHORIZED APPEARANCE BY ATTORNEYS: *Bunton v. Lyford*, 37 N. H. 512; 75 Am. Dec. 144, and extended note 146-151; compare *Great West etc. Co. v. Woodmas*, 12 Col. 46; *ante*, p. 204, and note.

STATE EX REL. THOMPSON v. CITY OF KEARNEY.

[25 NEBRASKA, 262.]

MANDAMUS, WHO MAY BE RELATOR IN APPLICATION FOR.—In the case of an application for *mandamus*, where private or corporate rights are affected, the relator must show an interest; but if the state is the real party, and the relator the mere informer, to procure the enforcement of a mere public duty, then a private individual may become the relator.

POWER OF CITY COUNCIL TO PERMIT REMOVAL OF WOODEN BUILDING WITHIN FIRE LIMITS.—The council of a city of the second class has power to permit the removal of a wooden building from one point within the fire limits to another point within such limits; and a mere volunteer who will sustain no special injury from such removal cannot complain.

APPLICATION for *mandamus*. The opinion states the case.

Stanley Thompson, for the relator.

Calkins and Pratt, for the respondent.

MAXWELL, J. The plaintiff alleges in his petition "that he is a resident tax-payer and elector of the said city; that the city of Kearney is a city of the second class, of more than five thousand inhabitants, and less than twenty-five thousand inhabitants, duly and legally organized and proclaimed under the general laws of the state of Nebraska for the incorporation of cities and towns within the state; that the said Lawrence Ketchum is the legally appointed, duly qualified, and acting marshal of the said city of Kearney; that on the twenty-ninth day of November, 1886, the council of said city, in accordance with the power granted them by the legislature in such cases, regularly passed an ordinance prescribing the fire limits within said city, as follows: Commencing at the northeast corner of lot 72, in the original town of Kearney Junction, at the intersection of Wyoming Avenue with Thirteenth Street, and running thence west to the west side of the alley between lots 72 and 77 of said original town, thence south along the west side of the alleys parallel with Wyoming Avenue to the south line of Seventh Street, thence east to the east side of

the alley between lots 838 and 839 of said original town, thence north on the east side of the alleys parallel with Wyoming Avenue to Thirteenth Street, thence west to the west line of Wyoming Avenue. Said ordinance provided that all buildings within said boundaries should be deemed to be within the fire limits of said city, and that all buildings thereafter erected, constructed, or placed within said limits should be constructed of stone, brick, or other incombustible material, with tin, iron, or other fire-proof roof. Said ordinance further provided that any person, persons, or corporations who should erect, construct, or place within said fire limits any building in violation of said ordinance, should, upon conviction, be fined in any sum not exceeding one hundred dollars, and that any building or structure erected, constructed, or placed within said fire limits, and not constructed of the material above mentioned, should be deemed and held to be a common nuisance, and may be abated by service of a notice by the chief of police, or any other policeman, upon the owner or occupant of said building or structure, in the manner provided by said ordinance, and that if such owner or occupant should not remove such building or structure within forty-eight hours from the time of the service of such notice, said chief of police or other policeman may remove such building or structure in the manner therein provided. . . . Said ordinance further provides that no person, persons, or corporations shall move any wooden building or structure from one place to another, within the fire limits of said city, except by permit obtained from the council of said city, as is required in section 2 of said ordinance; that on the fourth day of August, 1888, the Hamilton Loan and Trust Company, being the owner of a two-story, shingle-roof, frame building, situate on lot 374, city of Kearney, between Tenth and Eleventh streets, on the east side of Wyoming Avenue, and within the fire limits prescribed by ordinance, by their agent, A. J. Popple, removed their building from said location to lot 129, city of Kearney, between Eleventh and Twelfth streets, facing west on Wyoming Avenue, and placed the same upon said lot, which is in said fire limits as declared by ordinance, and said building still remains on said lot 129; that said building was placed in such a position that it adjoined two other frame buildings on the south, and in close proximity to the north of a row of frame and brick buildings; that thereafter your relator appeared before the council of said city, on the — day of Au-

gust, 1888, and requested said council to instruct the chief of police, Lawrence Ketchum, to notify the owner or occupants of said building to remove the same, and in case they would not remove the same within the required time, to proceed to remove the same himself, as is required by ordinance; that this the council refused to do. Your relator also requested said Lawrence Ketchum, chief of police, and all the other police of said city, severally, to notify the owner or occupants of said building to remove the same, and in case they should not do so within the required time, they should proceed to do so as is required by ordinance,—all of which they each refused, and still refuse, to do, for the reason that said city council had granted a special permit to said A. J. Popple to remove and place this building as was done. Your relator states that said special permit is wholly void, and of no force and effect, for the reason that it is against and in violation of the statute law regulating the incorporation of cities and towns within this state."

A copy of the fire ordinance is set out in the record.

The defendants demurred to the petition, on the ground that the facts were not sufficient to entitle the relator to the relief prayed for.

The relator fails to state that he has any interest in the subject-matter of the suit. So far as appears, he will not be injured by the removal of the building. No doubt any party owning a building within the fire limits of a city has cause of complaint if a wooden building is removed from another lot onto a lot adjoining his building, if it thereby increases the risk from fire. In such case the removal of a building would be a nuisance, from which he would suffer special injury, and no doubt in a proper case the courts would grant him appropriate relief.

The rule is well established in this court that, where the question is one of public right and the object of the *mandamus* is to procure the enforcement of a public duty, the relator need not show that he has any legal or special interest in the result, it being sufficient to show that he is a citizen, and as such interested in the execution of the laws: *State v. Shropshire*, 4 Neb. 411; *State v. Stearns*, 11 Id. 104. This rule applies more particularly to the enforcement of such public duties which the failure to perform will affect the entire community alike, and it is doubtful if the rule applies in a case like this.

The question was before the supreme court of New York in

People v. Collins, 19 Wend. 56, and Mr. Justice Cowen, in an elaborate opinion, reviews the cases to that date. He says (page 65): "Most of the cases respect private or corporate rights. Courts or officers or corporations are to be put in motion with a view to enforce some matter of private interest. In such case the title to relief at the suit of the relator must appear, and he should present himself as a party; otherwise, a mere stranger might obtain a *mandamus* officiously and for purposes not at all desirable to the real party. [See per Abbott, C. J., in *Rex v. Sheriff of Chester*, 1 Chit. 479.] In matters of mere public right, however, it is otherwise; here the people are the real party, as in the other they are the nominal."

The distinction between cases where a private person may act as relator to enforce a public duty, and where to maintain the action he must show an interest, is not very clearly drawn in the cases. The dividing line, however, appears to be that where private or corporate rights are affected, then the relator must show an interest, while if the state is the real party, and the relator the mere informer, to procure the enforcement of a mere public duty, then a private individual may become the relator. Tested by this rule, the relator could not maintain the action.

2. It appears that the building complained of was removed from one point within the fire limits to another point therein, presumably for the purpose of erecting a building on the former site, to conform to the fire limit ordinance. There is no increase of the combustible material within the fire limits of the city, and we have been unable to find any case where it has been held, under a statute like our own, that the city council might not permit such removal. And certainly a mere volunteer, who will sustain no special injury thereby, cannot complain.

The demurrer to the petition will be sustained, and the action dismissed.

MANDAMUS. — The law as to when *mandamus* will lie by a private individual to compel the performance of a public duty is discussed in a note to *Crane v. Chicago etc. Ry Co.*, 7 Am. St. Rep. 484-486.

MANDAMUS. — The applicant for a writ of *mandamus* must show a clear legal right to have the duty performed by the defendant sought to be coerced: *Mayor of Aspen v. Aspen Town & L. Co.*, 10 Col. 191; *Atchison v. Lucas*, 83 Ky. 451; *Dement v. Rokker*, 126 Ill. 174; *Clark v. State*, 24 Neb. 263. A private individual cannot ask for a *mandamus* to compel municipal authorities

to remove a nuisance, unless he is specially injured: *Atwood v. Portree*, 56 Conn. 80; for a *writ* to redress a public grievance must be prosecuted in the state's behalf by the state's attorney: *Weeks, Attorney-General, v. Smith*, 81 Me. 538; and it is questionable whether the deputy state's attorney can sue out a *writ*, using his own name as relator: *Shields v. State ex rel.*, 86 Ala. 584.

HUFF v. SLIFE.

[36 NEBRASKA, 448.]

GUARANTY OF PROMISSORY NOTE, LIABILITY OF. — One who, before maturity, guarantees the payment of a promissory note, becomes liable absolutely upon the default of the maker, and is not discharged from such liability by the failure of the holder to sue the maker, although the latter becomes insolvent.

ACTION on a guaranty. The opinion states the case.

O. B. Hewett, for the plaintiff in error.

J. M. Ragan and J. B. Cessna, for the defendant in error.

REBE, C. J. This action was founded upon the guaranty of the payment of a promissory note. The note was executed by one Zenas Farrer to plaintiff in error on the twelfth day of March, 1881, and payable on the first day of October of the same year to plaintiff in error, or order. The guaranty indorsed upon the note was in the following language: "I guarantee the payment of the within note. I. L. Huff."

The answer of the plaintiff in error, filed in the district court, alleges that the note was sold and delivered to defendant in error by plaintiff in error before maturity, and that the guaranty was executed at the time of the sale, and delivered as an indorsement, for the purpose of transfer and assignment in the ordinary course of business; that defendant in error had neglected to make any effort to collect the note from the maker thereof, and that it was not presented to him and payment demanded when it became due, and that plaintiff in error was not notified of the non-payment of the note until long after its maturity, and a few days before the commencement of the action; that at the time the note became due, the maker was solvent, and collection could have been made; but that since said time he had become insolvent, and the means of security held by plaintiff in error had been lost, by reason of the neglect of defendant in error to seasonably notify him of such non-payment.

The reply admits the purchase of the note before its maturity, but denies each and every other allegation of the answer.

The cause was tried to a jury. Upon the trial, defendant in error offered as evidence the note, with the guaranty written thereon, as hereinbefore set out, and rested his case.

Plaintiff in error then called as a witness Zenas Farrer, the maker of the note, and inquired of him whether the note was presented to him at the time it became due, and whether any demand was made upon him by plaintiff in error, as the holder thereof. Objection was made to this question, for the reason that the evidence sought thereby was incompetent and immaterial, which objection was sustained by the court. He was then asked to state if the note was secured in any manner. And again, whether he was able to pay it at the time it became due, and when he first learned that this note was in the possession of the present holder, defendant in error. These questions were objected to for substantially the same reason as that interposed to the first question, and the plaintiff in error, after taking exceptions, rested his case.

It is said in the transcript that the court then instructed the jury, and they retired to consider their verdict, but we find no instruction set out in the transcript. Neither do we find any assignment of error in the motion for a new trial which attacks the instruction given to the jury by the trial court; the grounds of the motion for a new trial being,—“1. That the verdict and judgment is not sustained by sufficient evidence, and is contrary to law; 2. For errors of law occurring on the trial, and duly excepted to by the defendant.”

The jury returned a verdict in favor of defendant in error for the amount due upon the note, and upon which verdict, after the motion for a new trial had been overruled, judgment was entered.

Plaintiff brings the cause to this court by proceedings in error, alleging as the grounds thereof that the court erred in excluding the testimony offered by plaintiff in error, and in overruling the motion for a new trial.

The only question involved is, whether the district court erred in refusing to permit plaintiff in error to prove the allegations presented in his answer,—that no notice was given plaintiff in error of the failure of the maker to pay the note, and the failure of the holder to institute seasonable proceedings against the maker, he having become insolvent after the maturity of the note.

These questions were in part before this court in *Bloom v. Warder*, 13 Neb. 476, and it was there held that a guaranty of payment, with waiver of protest, demand, and notice of non-payment indorsed upon the note, was an absolute contract upon a lawful consideration that the money expressed in the note should be paid when due, at all events, and without reference to the diligence of the holder or the ability of the maker to pay.

This case, however, being somewhat different from that one, we have re-examined the question, and conclude that the district court did not err in its ruling upon the objection to the proffered testimony.

The decisions of courts upon this question are not uniform, and cannot be harmonized, but we think that the great weight of authority is in favor of the doctrine held by the district court.

We note the following cases, which are nearly all directly in point: *Hungerford v. O'Brien*, 87 Minn. 306; *Allen v. Rightmire*, 20 Johns. 364; 11 Am. Dec. 288; *Brown v. Curtiss*, 2 N. Y. 225; *Roberts v. Riddle*, 79 Pa. St. 468; *Peck v. Frink*, 10 Iowa, 193; 74 Am. Dec. 384; *Fuller v. Tomlinson*, 58 Iowa, 111; *Clay v. Edgerton*, 19 Ohio St. 549; 2 Am. Rep. 422; *Roberts v. Hawkins*, 38 Alb. L. J. 66 (Mich.).

These cases go upon the theory that the guaranty is absolute and unconditional, and not like the conditional contract of indorsement, which is to pay on demand being made on the maker, and notice of dishonor given to the indorser in case payment is not made by the maker.

In *Brown v. Curtiss*, *supra*, Judge Bronson, in delivering the opinion of the court, says that in such cases the guarantor is neither the maker nor indorser of a promissory note. "On the contrary, he has, in very plain terms, made a contract of a different kind from either of those,—one well known to the law; and by that contract he must either stand or fall. He has guaranteed the payment of G. F. Brown's note; and we have no right to turn that contract into one of a different kind. This is so plain a principle that it would seem to be enough to mention it without saying anything more."

But the writer of that opinion enters upon a thorough discussion of the question, in which a great number of cases are cited and considered.

In *Clay v. Edgerton*, *supra*, Chief Justice Brinkerhoff, in writing the opinion, says: "We are aware that cases may be

found in which the point has been ruled otherwise, but it would seem to us that the reasoning of Bronson, J., in *Brown v. Curtiss, supra*, is unanswerable and irresistible."

The latter case was one in which, as in this, the holder of a promissory note transferred it, and indorsed thereon the following: "I guarantee the payment of the within note to C. Edgerton, or order. Isaac Clay." It was held that this was an absolute and unconditional guaranty, and no affirmation in the petition of demand and notice was requisite to make a *prima facie* case for recovery upon it.

This case would dispose of that portion of the answer of plaintiff in error which seeks to defend upon the ground that no demand had been made, nor notice given of non-payment.

In *Allen v. Rightmire, supra*, Chief Justice Spencer, in delivering the opinion of the court, which was in a case similar to the one at bar, says: "The undertaking here is not conditional, it is absolute, that the maker shall pay the note when due, or that the defendant will himself pay it." If, then, the contract of plaintiff in error was absolute and unconditional, it would follow that the district court did not err in its rulings upon the testimony offered, and that the judgment should be affirmed, which is done.

GUARANTORS MAKE THEMSELVES UNCONDITIONALLY LIABLE by entering into a guaranty of payment with respect to a note: *Cowles v. Peck*, 55 Conn. 251; 3 Am. St. Rep. 44; *Hungerford v. O'Brien*, 37 Minn. 306. And a guarantor merely for the collection of a note is liable thereon, although no steps have been taken against the maker, where the latter was, at the maturity of the note, and afterwards remained, so utterly insolvent that legal proceedings against him would be fruitless: *Brackett v. Rich*, 23 Minn. 486; 23 Am. Rep. 703. Where a guaranty is absolute, no averment of demand and notice is necessary; for, in such a guaranty, the guarantor makes himself unconditionally liable: *Clay v. Edgerton*, 19 Ohio St. 549; 2 Am. Rep. 422; *Hungerford v. O'Brien*, 37 Minn. 306; *Weiler v. Henarie*, 15 Or. 28; *Wise v. Midler*, 45 Ohio St. 383; but a mere guaranty of collection cannot be enforced until legal proceedings to collect have been instituted against the principal and proven ineffectual, even though the principal may have been insolvent: *Boeman v. Akeley*, 39 Mich. 710; 33 Am. Rep. 447; but see *Osborne v. Thompson*, 36 Minn. 528. Ordinarily a contract of guaranty does not terminate even with the life of the guarantor, but binds his personal representatives: *Kernochan v. Murray*, 111 N. Y. 306; 7 Am. St. Rep. 744.

GUARANTY. — In construing contracts of guaranty, the courts will look at all the surrounding circumstances to ascertain the true intention of the parties, and will not be entirely controlled by the technical meaning of the word "guarantee": *Weiler v. Henarie*, 15 Or. 28. A guarantor may waive his strict right to take advantage of the creditor's indulgence to the debtor, whereby the guarantor may ordinarily avoid his guaranty: *Mead v. Parker*,

111 N. Y. 259; and when the guarantor of the payment of a note has, by the form of his contract of guaranty, indorsed upon such note, waived all conditions, the non-compliance of which, in ordinary cases, would release him from his guaranty, the contract of guaranty need not be specially declared on, but may be admitted in evidence under the common counts in *assumpsit*. *Emerson v. Aultman*, 69 Md. 125. Delay in enforcing the payment by suit of a note will not relieve a guarantor for payment from any liability, except in so far as he may have suffered injury by the delay: *Burrow v. Zapp*, 69 Tex. 474.

ALEXANDER v. GRAVES.

[2d NEBRASKA, 408.]

CHATTEL MORTGAGE EXECUTED BY PARTY UNDER FICTITIOUS NAME. —

Where a person executes a chattel mortgage under a fictitious name and delivers it to the mortgagee, who, without knowing that the name of the mortgagor was fictitious, records the mortgage in the proper county, the title to the property mortgaged vests in the mortgagee by the delivery of the mortgage, and he may recover the property from another person to whom the mortgagor sells it, under his true name, after the mortgage was recorded.

REPLEVIN. The opinion states the case.

Kaley Brothers, and Batty and Casto, for the plaintiffs in error.

J. S. Gilham, for the defendant in error.

RESE, C. J. This case was tried upon a stipulation of facts, in connection with the deposition of one witness, and copies of certain notes and a chattel mortgage. The facts as agreed upon were, substantially, that on the sixth day of November, 1885, plaintiffs were engaged in the business of buying and selling horses and mules, at Hastings, in this state; that on that day a man came to their barn and gave his name as Albert McCoy, representing that he resided in and was engaged in farming on the northwest quarter of section 16, township 4, range 10, Webster County, near the town of Cowles; that he desired to purchase a span of horses, and gave plaintiffs the names of two or three parties who he said knew him, and went with plaintiffs to see them, but they were not in their places of business at the time the plaintiffs and purchaser were there. Plaintiffs, finally concluding that it would be safe to sell him the team, closed the contract at \$260, \$200 of which was represented by a promissory note due on the first day of November, 1886, the remaining \$60 by a promissory note maturing on the first day of March, 1886. The

mortgage was given on "one dark iron-gray mare, about six years old, about fifteen and a half hands high, one spotted mare, about five years old, about fifteen and a half hands high, bought of Alexander Brothers, this day; one bay horse, about five years old, about sixteen hands high; one set of double farm-harness; one Studebaker Manft. farm-wagon, almost new; one red cow, about seven years old, owned by said mortgagor, — free from all liens, and now in my possession, on northwest corner of section 16, township 4, range 8, Webster County."

This sale was made on Friday. Soon after the execution and delivery of the promissory notes and mortgage, plaintiffs forwarded the mortgage to the county clerk of Webster County, with instructions to file the same of record. The mortgage was received by the clerk at nine o'clock on Monday morning, and filed at fifteen minutes thereafter. The property being delivered to the purchaser at the time of the sale, he started toward Cowles, Webster County, the same evening, and arrived there some time Sunday evening, the 8th, and on Monday morning he went to Red Cloud, arriving there about eleven o'clock in the forenoon, and after trying to obtain a loan on the spotted mare from several parties, he approached the defendant for that purpose. About two o'clock of that day, defendant having examined the county records, purchased the property in dispute, paying the principal portion of the purchase price in cash. The person from whom he purchased gave the name of Davis, which was his real name, the name McCoy, assumed at the time of the purchase of the property from plaintiffs, being fictitious. Within a very short time after the sale of the property by plaintiffs, they learned of the purchase thereof by defendant, when this suit was instituted.

The deposition referred to in the stipulations of facts is that of George Davis, *alias* Albert McCoy, who, at the time of the taking of the deposition, was in custody and detained in the county jail of Buffalo County for safe-keeping. In this deposition he testifies to substantially the same facts as stated above. He bought the property of plaintiffs, under the name of McCoy, executing the mortgage thereon, and sold it to defendant under the name of Davis, his true name, after the mortgage was filed. Upon a trial, the district court found in favor of defendant. Judgment being rendered upon such finding, plaintiffs bring the case to this court by proceedings in error.

The case presents some rather new features, and no case in point is presented by the brief upon either side, and we are unable to find any such case. There is no doubt but that the execution of a chattel mortgage vests the title in the mortgagee: *Adams v. Nebraska Nat. Bank*, 4 Neb. 373; *Marseilles Mfg. Co. v. Morgan*, 12 Id. 66.

It would seem that the sale and delivery of the property to Davis, under the assumed name of McCoy, transferred the title of the property to him, which was immediately transferred back by the mortgage. The mortgage was valid. By it the title was transferred to plaintiffs as fully as it had been received by the purchaser from them. Plaintiffs acted in good faith, and immediately thereafter, and before the purchase by defendant, placed the mortgage on record in the proper county. Who, then, did Davis defraud? Was it plaintiffs? We think not. It is true he bought the property of them, but he secured the purchase price by at least the whole property purchased. It would make no difference as to what his real name was, so far as they were concerned. They had the mortgage on the property, which was their security. That mortgage could be enforced at any time. He sold the property to defendant, representing it to be free from encumbrance, when it was not; representing that the title was vested in him when it was not; that he could convey a perfect title, when he could not. And of which fact the purchaser had constructive notice. We think, therefore, that the learned judge of the district court misapplied the law, and that his decision upon the agreed facts was erroneous.

The judgment of the district court is therefore reversed, and the cause remanded for further proceedings.

CONVEYANCES BY PARTIES IN THEIR WRONG NAMES. — This subject is discussed in note to *Fallon v. Kehoe*, 99 Am. Dec. 350, 351. Where a landowner executed a deed of conveyance to land owned by him, naming as the grantee a fictitious grantee, and then in the name of such fictitious grantee executed another deed of conveyance to another person, such latter person took a good title: *David v. Williamsburgh etc. Ins. Co.*, 33 N. Y. 265; 38 Am. Rep. 418.

CITY OF OMAHA v. KRAMER.

[25 NEBRASKA, 499.]

EMINENT DOMAIN PROCEEDING, TESTIMONY AS TO DAMAGES IN. — A witness called to testify to the amount of damages caused to a person's land by the construction of a public improvement near it cannot be permitted to state the amount of damages to which, in his opinion, the owner is entitled. The witness may testify to the value of the land before the construction of the improvement, and to the value thereof immediately afterwards, and the duty will then devolve upon the jury to determine, from the testimony, the amount of the damages.

WORDS "OR DAMAGED," IN SECTION 21, ARTICLE I, OF CONSTITUTION OF NEBRASKA, include all actual damages resulting from the exercise of the right of eminent domain which diminish the market value of private property.

EMINENT domain. The opinion states the case.

John L. Webster, for the plaintiff in error.

Warren Switzer, for the defendant in error.

MAXWELL, J. This is an appeal from the award of damages allowed the defendant in error, caused by the construction of the viaduct across the railway tracks on Eleventh Street, in the city of Omaha. On the trial of the cause the jury returned a verdict in his favor for the sum of two thousand dollars. The city assigns a number of errors in this court. Those which are deemed material will be noticed in their order.

1. That the judgment is not sustained by sufficient evidence.

The property in controversy is situated on the northwest corner of Eleventh and Jones streets, in Omaha, and fronts on each of said streets sixty-six feet. An examination of the testimony shows that witnesses called by Mr. Kramer were asked questions in this form, to show the amount of damages sustained: "In your opinion, what was the damage to that property, if anything, by the construction of this viaduct?" The witnesses then, over the objection of the city attorney, were permitted to state the amount of damages to which, in their opinion, the defendant in error was entitled. In this we think the court erred.

In *Republican V. R. R. Co. v. Arnold*, 13 Neb. 485, it was held that a witness familiar with the value of a particular piece of land across which a railroad was built might be permitted to testify to the value of such tract immediately before the location of such road, and to the value thereof immediately afterwards, not taking into consideration general ben-

efits. This rule seems to be the proper one under which witnesses will state facts,—the relative value of the property,—and the duty will then devolve upon the jury of deducing from the testimony the amount of damages. Under this rule, the basis upon which each witness makes his computation is before the jury, who may thus compare the different valuations, and also consider the weight to be given to the testimony of each witness, whereas, if the witness swears to a conclusion,—the amount of damages,—the basis upon which he makes his estimate will be wanting. We therefore adhere to the rule heretofore adopted, as best calculated to elicit the facts and do justice between parties.

2. As there must be a new trial, we will not discuss the instructions at length, but instead thereof will state the general rule governing the recovery of damages.

The attorney for the city contends that what are termed consequential damages cannot be recovered, as they are not within the language of the constitution, and the case of *Pennsylvania R'y Co. v. Marchant*, 119 Pa. St. 541, 4 Am. St. Rep. 659, is cited to sustain that position. In that case, the plaintiff below was the owner of property on the north side of Filbert Street, in the city of Philadelphia, and brought an action against the railway company to recover damages for injury to his property on said street, caused by the operation of its elevated railroad. The latter is constructed on land owned by the corporation, and the entire width of Filbert Street intervenes between the railroad and the complainant's house. He complains of the noise, dust, smoke, and cinders, and the constant jar caused by passing trains, the effect of which is to depreciate the market value of the property. In the court below the complainant recovered judgment. The constitution of Pennsylvania contains the following provision: "Municipal and other corporations, and individuals invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured, or destroyed by the construction or enlargement of their works, highways, or improvements, which compensation shall be paid or secured before such taking, injury, or destruction."

A majority of the court, by Paxson, J., concede that the diminution of value of the complainant's property by reason of the elevated railway spoken of is established, but hold that there can be no recovery, because the word "injury" or "injured," as used in the constitution, means such a legal wrong

as would be the subject of an action for damages at common law.

We entertain a high regard for the supreme court of that state, and have had frequent occasion to cite its decisions and quote from the opinions, but we cannot give our assent to the doctrine above expressed. An examination of the majority opinion shows that, while the court insists that it has no right to inject words into the constitution, it has in fact apparently injected the words, "a legal wrong such as would be the subject of an action for damages at common law." In other words, it limits the right to recover to legal injuries, instead of injuries in fact.

Section 21, article 1, of the constitution of this state provides that "the property of no person shall be taken or damaged for public use without just compensation therefor." The section above taken, except the words "or damaged," was in the constitution of 1867. Under that constitution, if any portion of a person's real estate was taken for public use, he could recover all the damages sustained by the taking; but if none of his real estate was taken for public use, he could recover nothing, although his property had been greatly damaged by such use. The provision, therefore, is remedial in its nature, and the well-known rule that, in the construction of remedial statutes three points are to be considered, viz., the old law, the mischief, and the remedy, and so to construe the act as to suppress the mischief and advance the remedy, is to be applied: 1 Bla. Com. 87. Applying this rule to the provision in question, and it embraces all damages which affect the value of a person's property, and includes cases like that under consideration. In other words, the words "or damaged," in section 21, article 1, of the constitution, include all actual damages resulting from the exercise of the right of eminent domain which diminish the market value of private property: *Reardon v. San Francisco*, 66 Cal. 492; 56 Am. Rep. 109; *Atlanta v. Green*, 67 Ga. 386; *Chicago etc. R. R. Co. v. Ayers*, 106 Ill. 511; *Rigney v. Chicago*, 102 Id. 64; *St. Louis etc. R. R. Co. v. Haller*, 82 Id. 208; *Hot Springs R. R. Co. v. Williamson*, 45 Ark. 429; *Gotteschalk v. Chicago etc. R. R. Co.*, 14 Neb. 550; *Schaller v. Omaha*, 28 Id. 325.

The fact that damages are consequential will not preclude a recovery, if the construction and operation of the public improvement is the cause of the injury; and it is not necessary that the damages be caused by trespass or an actual physical

invasion of the owner's real estate. The test is: Excluding general benefits, is the property in fact damaged? If so, the owner is entitled to compensation.

It is not within the scope of the authority of the law-making department of the government to take the property of A and give it to B, even if B has the right to condemn property for public use. This being so, it is equally beyond the power of such department to confer the right on B to damage or destroy the power of A without making compensation therefor. The right of the legislature to authorize the taking of private property for public use is based on the condition that an equivalent in value be paid to the owner. If property is diminished in actual value by reason of a public improvement, it is to the extent of the diminution taken for public use, as much so as if it was directly appropriated. The cases differ in regard to the mode of appropriation only. In the one case all the property is taken, while in the other it is taken only to the extent that it is diminished in value, and in either case the owner is entitled to be compensated for his loss. Laws are made to protect private rights, and not to destroy them, the only exception being where a party by his own fault has forfeited the same. By protecting and enforcing the rights of each individual, the rights of all are respected and secured, and the humblest person made to feel that he can suffer no wrong to his estate without receiving adequate redress. Constitutional guaranties are of little avail unless carried out in the spirit in which they were framed, and no plea of public benefits should be permitted to impoverish the owner of private property, or override a plain constitutional inhibition. If the public desire to erect works for public use, then the public—the party benefited—must bear the burden, while each owner of private property, as one of the public, in some of the modes provided by law, must pay his share of the indebtedness or expense, and thus the burdens are equalized.

The judgment of the district court is reversed, and the cause remanded for further proceedings.

EMINENT DOMAIN. — What damages may be recovered by the owner of real estate condemned and appropriated to public use: *Pennsylvania R. R. Co. v. Merchant*, 119 Pa. St. 541; 4 Am. St. Rep. 659, and note 669; *Denver City etc. Co. v. Middaugh*, 12 Col. 434; *ante*, p. 234, and note; *Ohio etc. R'y Co. v. Wachter*, 123 Ill. 440; 5 Am. St. Rep. 532, and extended note 537-540; *Shesky v. Kansas City C. R'y Co.*, 94 Mo. 574; 4 Am. St. Rep. 306,

and extended note; *Leroy etc. Ry Co. v. Hawk*, 39 Kan. 638; 7 Am. St. Rep. 566, and note; *Wabash etc. Ry Co. v. McDougall*, 126 Ill. 111; 9 Am. St. Rep. 539, and note 546, 547.

WITNESSES — AMOUNT OF DAMAGES. — Witnesses are not permitted to testify as to what they think the amount of damages should be; but are only allowed to give the facts in evidence from which they derive their opinions, and from such facts the jury will decide as to the amount of damages to be recovered: *Fremont etc. R. R. Co. v. Marley*, 25 Neb. 138; *ante*, p. 482, and note. Compare *Leroy etc. Ry Co. v. Hawk*, 39 Kan. 638; 7 Am. St. Rep. 566.

McCLENNEGHAN v. OMAHA AND REPUBLICAN VALLEY RAILROAD COMPANY.

[35 NEBRASKA, 628.]

RAILROAD BRIDGE OVER RIVER, DUTY OF COMPANY IN CONSTRUCTION OF. —

A railroad company having authority to build a bridge across a river is bound to so construct such bridge as to avoid injury to adjacent property owners, as well as to have regard to the permanence and safety of the bridge as a means for the transportation of persons and property over its line. If one class of bridge is permanent and safe, but its construction will necessarily impede the flow of water and ice that is known or is reasonably to be expected to pass in the stream, and another class would be safe, and would not impede the flow of water and ice, to the injury of such adjacent property owners, the latter class should be selected.

ERROR IN GIVING INSTRUCTION WHICH MISTATES LAW IS NOT CURED BY giving another instruction which correctly states it, because the court cannot say which instruction the jury will follow.

OWNER OF CATTLE IS NOT BOUND TO PLACE THEM ON POOR MARKET, when, in his judgment, the market was likely to improve in a short time. He has a right to exercise his own judgment and discretion in the matter. And if the cattle are subsequently injured through the negligence of another, the latter will be liable for such injury, provided the owner did not allow injury to result to them from any other cause which he could have avoided.

ACTION for damages. The opinion states the case.

W. H. Munger and E. F. Gray, for the plaintiff in error.

J. M. Thurston and W. R. Kelly, for the defendant in error.

REESE, C. J. This action was instituted in the district court of Saunders County for the recovery of damages resulting from the alleged negligent construction of the railroad bridge of defendant in error, across the Platte River, by which an unlawful obstruction is alleged to have been created in the river, which prevented the natural flow of the ice and water therein, and caused the ice and water to gorge, back up, and overflow the

banks of said river, to the injury of plaintiff's farm and the property thereon.

A jury trial was had, which resulted in a verdict and judgment in favor of defendant in error, who was defendant below, and from which plaintiff brings the case to this court by proceedings in error.

A large mass of testimony was submitted to the jury, about eighty witnesses having been examined, and in which there was a sharp conflict upon almost every question at issue in the case. The preponderance of the evidence was largely in favor of defendant, and will not be examined further than to say that the verdict of the jury was clearly supported thereby.

The case is presented here solely upon errors of law occurring at and after the trial, and it is argued that even though the preponderance of evidence was against plaintiff, yet he had the right to have the case fairly submitted to an impartial jury, whatever the testimony might be.

A large number of errors are presented, but few of which will be examined, as the same questions will not likely arise upon a retrial, should one be had.

From the testimony introduced, and from the instructions asked by the parties to the action, it plainly appears that the case was presented to the jury upon these two theories contended for by the parties to the trial. On the part of plaintiff it was contended that the bridge was so constructed as to unnecessarily impede the flow of the river, and thereby cause the water and ice to dam up and gorge above the bridge, which necessarily resulted in an overflow of the land owned by plaintiff opposite and below the gorge.

While, upon the other hand, it seems to have been contended by defendant that the highest obligation resting upon it in the construction of the bridge was that of its safety and use in the general requirements of railroad traffic.

Edmund Lane, the engineer who constructed the bridge, was called as a witness for defendant. He testified that his occupation was that of a civil engineer; that he had followed that profession about twenty years, nineteen of which had been in the state of Nebraska. He testified as to the history and habits of the Platte River, having had a general knowledge of it since 1871 or 1872, and having constructed seven or eight bridges across it during the time referred to; that in the construction of a bridge across a river similar to the Platte, the first and primary consideration would be to provide for

the passage of the water, and to avoid obstruction of ice or drift-wood, or any other things which might be expected from the general character of the stream; and next, the strength and durability of a bridge required for the traffic. We quote briefly from his testimony, as follows:—

Q. Taking into consideration the state of engineering skill and knowledge, as it existed in 1876 (the time of the construction of the bridge in question), together with such knowledge of the history and habits of the Platte River as it was then known, what, in your opinion, was then the best and safest character of structure to be erected across Platte River in that place? A. I should think a pile and stringer bridge was sufficient for all requirements, for the passage of ice and water and any other obstruction, and also for the requirements of the traffic.

Q. In the construction of a pile and stringer bridge, what is the practical limit of the length of a span? A. About twenty feet.

Q. What is the result if a longer span than twenty feet be admitted in a pile and stringer bridge? A. It would have to be trussed; you could not get timber long enough to carry the weight.

Q. What is the difference, in the use, between a twenty or twenty-four? What is the objection to a longer span as to safety or stiffness? A. The objection to a longer span is the shock that the rolling train gives, a wave motion, to it, which is bad for longer timber.

Q. Can a pile and stringer bridge, practical therefor, be constructed with greater spans than twenty feet? A. Not with safety for a railroad bridge.

Q. If longer spans be adopted, what is the character and sort of bridge? A. A truss bridge.

Q. Which, between a truss bridge and a pile and stringer bridge, having reference to the safety in its use, and of general requirements of railroad traffic,—which is the better sort of bridge? (Objected to as incompetent, immaterial. Overruled. Exception.) A. For wooden structures I think the pile and stringer bridge the safest.

Q. What is the general character of the Platte River, as to the permanency of its channel; that is, as to the permanency of its channel at a given place? A. It is not permanent; it is movable.

Q. What was its character at Valley in 1886, as to the

establishment of its channel at a given place? A. There was no permanent channel; it was always shifting.

Q. Does the fact that the channel is a shifting one, that is, moving from place to place within its banks, have any effect in determining the character of bridge to be erected there, as to whether it should be a truss bridge or pile and stringer?

A. Taking the Platte River and its characteristics, with the channel as wide and no defined channel, I prefer a stringer bridge to a truss bridge. If it was a place where the channel was defined in one place, you might generally build a truss bridge for the flow of ice to pass through.

We copy the following from the cross-examination: —

Q. Now, I understand you to say that you regarded a pile and stringer bridge a safer structure than a truss bridge. Wherein is it a safer bridge for the passage of traffic? A. It is easier constructed, and it is safer on account of derailment. On account of derailment we generally have guards along on the outside of the bridge, and the car may cross the bridge and get off, but with the truss bridge if a car got a little to one side it might strike the truss and knock it down.

Q. If a car should run off from the track while crossing the bridge, and you had the truss up, it would be likely to strike against the truss and knock it out of place? A. Yes, sir, and knock some of its members out.

Q. If you did not have the truss there, would it not be likely to go into the river? A. It might go, but we have outguards on the side for protection.

Q. How high guards? A. We use six by eight timbers.

Q. That is so the wheels would not run off? A. Yes, sir.

Q. These guards are put outside the iron rails? A. Yes, sir, and sometimes the inside had guards, too.

Q. They are placed how far from the iron rail? A. About a foot or eighteen inches.

Q. That is so that if the car got off, the wheels would not run over and get off the bridge? A. That is mostly the object; yes, sir.

Q. Could you not have that guard on a truss bridge just the same? A. We do it on truss bridges, just the same.

Q. Then if you do it on a truss bridge, and that guard keeps the car from going outside of it, then it would not strike the truss, would it? A. The top of the car gets slued round, so it is very apt to knock the truss. I have known them to

knock down truss bridges that way, and I have known them to go across trestle bridges that way. . . .

Q. Truss bridges have been in use by railroads, have they not? A. Yes, sir.

Q. They are in use still to-day, are they not? A. Yes, sir.

Q. Constantly being used? A. Yes, sir.

Q. Are they not regarded as practicable? A. Yes, sir.

Q. And were regarded, before 1876, as practicable, were they not? A. Yes, sir.

This must serve to indicate what, to some extent, was the contention of the parties in the trial to the jury.

Defendant asked, and the court gave, a number of instructions, one of which we here copy. It is as follows:—

“5. You are instructed that, in order to entitle the plaintiff to recover in this case, he must have satisfied you by a preponderance of proof, not only that the defendant's bridge and approaches caused the overflow and damage complained of, but also that in the construction of the same the defendant was guilty of some actual wrong or negligence, but for which the obstruction would not have existed nor the overflow resulted. The defendant had a right to construct the bridge and the approaches across the river at the point named, although in so doing the river was necessarily obstructed to such an extent as to cause gorges and overflow, and in the absence of negligence or want of ordinary skill in so doing, it cannot be held to have done a wrongful or negligent act. In the erection of its bridge, the defendant was bound to have,—

1. A special regard for the permanence and safety of the same as a means for the transportation of persons and property over its line of road, and if, in the exercise of its discretion, the defendant chose to erect this bridge, which is known as a pile and stringer bridge, instead of a bridge of some other kind, as, for instance, a truss bridge, in the belief, with such means of knowledge and in the light of such engineering skill as was then obtainable, that the former more nearly than the latter complied with those conditions, then it was guilty of no wrong or negligence in this respect, although the latter description of bridge, on account of greater length of spans, might have permitted a freer flow and passage of ice and water, and might, therefore, have been less likely to contribute to an overflow of plaintiff's land than the bridge actually built, and under such circumstances the defendant would not be liable, even if it committed an error of judgment in this regard, and if it should

now appear that the bridge actually built is not superior in the respect named to the truss or some other kind of a bridge."

We think a fair analysis of this instruction may be said to be that, to entitle plaintiff to recover, he must satisfy the jury, by a preponderance of evidence, not only that the structure caused the overflow, but also that in the construction of the same defendant was guilty of some actual wrong or negligence, but for which the obstruction would never have existed; that defendant had the right to construct the bridge and approaches, although in so doing the river was necessarily obstructed to such an extent as to cause a gorge and overflow, and in the absence of negligence or want of ordinary skill in so doing, it could not have been held to have done a wrongful act; that it was bound to have, first, a special regard for the permanence and safety of the structure as a means for the transportation of persons and property over its line of road, and if, in the exercise of its discretion, the defendant chose to erect a pile and stringer bridge, instead of some other kind, as, for instance, a truss bridge, in the belief, with such means of knowledge and in the light of such engineering skill as was then attainable, that the former more nearly than the latter complied with these conditions, then it was guilty of no wrong or negligence in this respect, although another form of bridge, on account of its greater length of spans, might have permitted a freer flow of ice and water, and have been less likely to cause or contribute to an overflow of plaintiff's land, etc. In other words, that defendant's first duty in constructing the bridge was to have regard to the permanence and safety of the same as a means of transportation of persons and property over its line of road, and then, if, in the exercise of its discretion as to the character or quality of bridge to be constructed, it should select one which would impede the flow of water and ice to a greater extent than one of another character or quality, even though it might have proven as safe, the defendant would not be liable for this error of judgment.

We not only think this instruction fails to state the law correctly, but that it states it incorrectly. In *Omaha etc. R. R. Co. v. Brown*, 14 Neb. 170, a case quite similar to this, and growing out of the construction of the same bridge, Judge Cobb, in writing the opinion of the court, says: "It was the duty of the railway company, in planning and constructing its bridge, to bring to their execution the engineering knowledge and skill ordinarily practiced in such works, and to see

to the practical application of such knowledge and skill to the work in hand, among other things, so as to allow of the passage of the water and ice such as is known to pass in the stream annually, or which may reasonably be expected to occur occasionally, without regard to such great or sudden overflows as are often designated as acts of God."

This rule of law was adhered to in the same case, *Omaha etc. R. R. Co. v. Brown*, 16 Neb. 166, by Judge Maxwell, and by Chief Justice Cobb, at page 168.

In *Brown v. Cayuga etc. R. R. Co.*, 12 N. Y. 486, a case involving principles somewhat like the one at bar, Judge Johnson, in delivering the opinion of the court, says: "This [the legislative authority conferred upon the road to construct the bridge, which is substantially the same as section 86, chapter 16, of the Compiled Statutes] confers upon the company authority to cross a stream with their road; but it would be a great stretch upon the language, and an unwarrantable imputation upon the wisdom and justice, of the legislature, to hold that it imparts an authority to cross a stream in such a way as to be a cause of injury to others owning adjoining property. They were bound, in crossing the stream with their road, by the same obligation which would have bound a private owner of the land and stream had he bridged it."

As we understand the rule of law as applicable to the case at bar, the defendant had the right to construct its bridge at the place selected, and in such construction it was bound to so build as to have regard for the permanence and safety of the bridge as a means of transportation of persons and property over its line, and also to so construct its bridge as to avoid injury to adjacent property holders. If one class of bridges was permanent and safe, and its construction would necessarily impede the flow of water and ice, such as is known or reasonably to be expected to pass in the stream, and another class would be safe, and would not impede the flow of water and ice, to the injury of such adjacent property holders, the latter class should be selected. In short, the duty of a railroad company, in the construction of a bridge over such a stream as the Platte River, would be both to the traveling and shipping public, and to the land-owners near by. Neither could be sacrificed to the other. Both should be equally protected. This instruction falls far short of stating this rule.

But it is insisted that even though it be open to the criticism made, yet, taking the whole of the instructions together,

the law is correctly stated, as the instructions given by the court upon its own motion were correct, and have not been assailed. This would do were it not that the instruction assumes to state a rule of law applicable to the whole case, and which might be decisive of it, and not a statement of a portion of the law, which is completed in other instructions. The rule of law adopted by this court is plain and unequivocal that if an instruction misstates the law, another instruction correctly stating it will not cure the evil, for the reason that the court cannot say which instruction the jury will follow: *Wasson v. Palmer*, 18 Neb. 378; *McPherson v. Wiswell*, 19 Id. 117; *Bal-lard v. State*, 19 Id. 610.

Upon this question, we are cited by defendant in error to *Sioux City etc. R. R. Co. v. Finlayson*, 16 Neb. 578; 49 Am. Rep. 724. The instruction objected to in that case was, that before plaintiff could recover he must prove certain facts, which were the principal and essential facts in the case, though not all, perhaps. But the court did not say that if those facts were proven, a recovery could be had. Hence it was permissible to supplement the instruction with others until the whole law upon that part of the case was stated. The instruction in this case involves quite a different principle. Here the jury are told that in order to entitle plaintiff to recover he must satisfy them of certain facts, and "under such circumstances the defendant would not be liable, even if it committed an error of judgment," etc. This, as we have seen, was not a partial statement of the law, as in the case cited, but a misstatement, as in the case of *Wasson v. Palmer*, *supra*.

At the time of the gorge and overflow of the river upon plaintiff's farm he had a number of cattle, some of which were fat and ready for market, but, as he stated in his cross-examination, the market was very low at that time, and he did not see proper to sell the cattle for the prices which could then be obtained. It appears from his testimony that his feed-yards were not far from the river; that he had 145 head of beef cattle, and that upon the overflow of his feed-yards he removed them to another place, where they became partially surrounded by the water, so that they could not be fed and cared for as before, and that they thereby diminished in value.

The court instructed the jury upon this part of the evidence as follows:—

"16. If you find that plaintiff's fat or beef cattle were in reasonably good and proper condition for market at the time

of the overflow, then it was his duty to market said cattle, or such of them as were in condition to market, providing he could, with reasonable expenditure of labor and money, have marketed them. And the defendant, in that case, would not be liable for subsequent loss or depreciation in the value thereof."

The giving of this instruction is assigned for error. It was, no doubt, suggested by the well-established rule that where a loss is impending, that it is the duty of the person upon whom the loss may fall to exercise care, in order that the injury may not be unnecessarily increased, and, perhaps, upon the suggestion of contributory negligence on the part of plaintiff in not selling the cattle and realizing as much out of them as the market would afford.

We doubt this instruction being correct, when applied to this kind of a case. Plaintiff had the right to select his own time in which to sell. Had he placed the cattle upon the market at that time, in consequence of the overflow, we know of no rule by which he could recover whatever damage he might have sustained by selling upon a poor market, had the market become better. It was his duty to take such care of his stock as would make the loss as light as possible, perhaps, upon whoever it might fall. But it cannot be said that it was his duty to place his cattle upon a poor market, when, in his judgment, the market would be better in a short time. He had a right to exercise his own judgment and discretion in that matter, but he would have no right to allow his cattle to depreciate, starve, be drowned, or perish from any other cause which he could have avoided. This, we think, is the full extent of the rule. In our opinion, the instruction should not have been given.

An additional motion for a new trial was filed by plaintiff, alleging various grounds therefor, but which it is not deemed necessary to notice at length. There are some affidavits produced which tend to show misconduct on the part of some of the jurors, and that some person, whose name need not be here given, sought and solicited other persons to interfere with the deliberations of the jury, and by criminal means, perhaps, prevent a verdict from being rendered in favor of plaintiff.

While the trial court should make a special effort to protect the purity of jury trials by the infliction of heavy penalties upon persons who would even make an effort to contaminate verdicts by bribery or other improper means, and, if necessary, grant a new trial, yet there is no direct proof that defendant

was a party to any transactions detailed in the affidavits. And there is positive testimony that defendant's counsel, who conducted the trial, and whose integrity is unimpeachable, knew nothing of what was alleged to have occurred. It is therefore deemed unnecessary to examine the question further.

The judgment of the district court will be reversed, and the cause remanded for further proceedings.

RAILROADS. — As to the duty required of railroad companies, and the skill they must employ, in the construction of their bridges and trestles in order to provide against ordinary floods which can be reasonably anticipated, see *Columbus etc. R'y Co. v. Bridges*, 86 Ala. 448; 11 Am. St. Rep. 58, and note 64, 65; compare *Emery v. Raleigh etc. R. R. Co.*, 102 N. C. 209; 11 Am. St. Rep. 727, and note 736.

WILLIAMS v. EIKENBERRY.

[25 NEBRASKA, 721.]

DECLARATIONS OF VENDOR AS TO TITLE INADMISSIBLE, WHEN. — The declarations of one from whom a party obtains title to property, made after the transfer of title, and in derogation thereof, are inadmissible as against the vendee for the purpose of defeating the title. But where the vendor, testifying as a witness to prove the sale, is, on his cross-examination, asked, for the sole purpose of affecting his credibility, whether he had not, at a time subsequent to the alleged sale, offered to sell the same property, as the owner thereof, to another, and denies it, the testimony of other witnesses is admissible to impeach him.

JUSTIFICATION OF OFFICER IN REPLEVIN FOR ATTACHED PROPERTY. — When an officer attaches property found in the possession of a stranger claiming title, in an action of replevin by such stranger, the officer, to justify his possession, must not only prove that the attachment defendant was indebted to the attachment plaintiff, but that the attachment was regularly issued.

REPLEVIN. The opinion states the case.

J. H. Haldeman, for the plaintiff in error.

H. D. Travis and E. H. Wooley, for the defendant in error.

RESE, C. J. This was an action of replevin instituted in the district court against the sheriff of Cass County, for the purpose of recovering the property described in the petition of plaintiff in error.

The cause was tried to a jury, which trial resulted in a verdict and judgment in favor of defendant in error, and was brought into this court by proceedings in error, where the judgment of the district court was reversed, and the cause

remanded: See *Williams v. Eikenberry*, 22 Neb. 210. Another trial was had in the district court, resulting in the same verdict and judgment as at first, and the cause is again presented for review by proceedings in error.

It appears from the evidence that Lawrence Holland was, at one time, engaged in the lumber business in the town of Manley, in Cass County, and that such an arrangement was made between himself and plaintiff in error here as resulted in the transfer of the lumber-yard to plaintiff in error. Holland being indebted at that time, his creditors soon after instituted attachment proceedings against him, and levied upon the lumber yard in dispute, when plaintiff in error instituted an action in replevin for the possession of the property.

Lawrence Holland was called as a witness for plaintiff in error, and upon his examination in chief he testified to the transfer to plaintiff in error. Upon his cross-examination he was asked if he did not at a certain time, which was after the transfer to Williams, and after Williams had taken possession of the lumber-yard, say to Mr. Roberts, cashier of the Commercial Bank at Weeping Water, that he would turn the lumber-yard over to him. His answer was, that he did not. He was then asked what he did say, when he answered: "I told Roberts that I had turned the yard over to Mr. Williams; that I had sold the yard to Mr. Williams, as he had suggested to me to do," etc.

At another time, on cross-examination, substantially the same question was asked, to which objection was made, and which objection was overruled, and after exception entered, witness answered, "No."

Other questions of similar import were asked with like results.

Among the witnesses called for the defense were Mr. Travis, Mr. Roberts, and Mr. Wooley, who were all interrogated upon the same matter, and over the objection and exception of plaintiff in error were permitted to testify, in substance, that in a conversation at about the same time as that mentioned in the cross-examination of Holland, he (Holland) offered to turn over to the plaintiff in the attachment suit the lumber-yard, which was then in the possession of plaintiff in error, and which had been for some considerable time.

The question presented by the issues in the case was, as to the validity of the purchase of the lumber-yard from Holland by Williams, and it would seem that the purpose of defendant

in error, in introducing the testimony referred to, was to impeach the witness Holland, and also for the purpose of proving title to the property mentioned at the time of the declaration.

In the testimony of Mr. Wooley, the following occurs:—

Q. I also ask you to state whether or not, about the twelfth day of January, 1886, Mr. Holland, in the Commercial Bank, said to you that he would turn over this Manley lumber-yard upon the indebtedness?

Haldeman objected. Incompetent, immaterial, and irrelevant to affect the title. Overruled, and exception.

A. Yes, sir, he did.

We think it quite clear that Williams's title could not be affected by any statement made by Holland, after possession was taken by Williams, in disparagement of such title.

In Bump on Fraudulent Conveyances, page 587, it is said: "The existence of a fraudulent intent must always be proved by evidence which is competent as against the grantee. The acts and declarations of the debtor, however, made after the transfer, have not, in the absence of any proof of a conspiracy, any tendency to prove the cause or motive of the act. After the transfer is consummated, the debtor becomes a stranger to the title for all purposes, and his acts and declarations are no more binding on the grantee than are those of any stranger to the transaction. They are in their nature hearsay and irrelevant. No person, moreover, should be allowed to defeat his transfer by his own acts or words. If the declarations or acts are made or done with the assent of the grantee, or if the debtor is produced as a witness, then they may be used as evidence upon other grounds, not merely as intrinsically competent of themselves. If the debtor and grantee are both parties to the suit, the subsequent declarations of the debtor are competent evidence against him."

That part of the above quotation, referring to the matter of the production of the debtor as a witness, is followed by the citation of *Borland v. Mayo*, 8 Ala. 104; *Venable v. Bank*, 2 Pet. 107; and *Knight v. Forward*, 63 Barb. 311.

We have carefully examined these cases, and are convinced that the cases of *Borland v. Mayo*, and *Venable v. Bank*, *supra*, are not in point.

Knight v. Forward, *supra*, is a case quite similar to the one at bar, in some respects. The action was in trover, for the value of a cutter, sulky, harness, and cow. The answer was a general denial. The property in dispute had been levied upon

by virtue of an execution, and sold. It appeared upon the trial that a bill of sale of the property in question, and other property, was made and delivered by the judgment debtor to the plaintiff in that action, in payment of a note given by the debtor to another party, and which was then held by the plaintiff. The debtor was a witness to prove the transfer, when he was asked, on cross-examination, whether he had not at a certain time, subsequent to the alleged transfer, offered to sell the harness and cutter in question to the defendant in the action as his, witness's, property. This was objected to, and the objection was sustained. The supreme court held the action of the trial court in sustaining this objection to be erroneous. It is said that such declarations were not competent to impair and destroy the title of the plaintiff; that they were utterly incompetent on the merits of the controversy; that they could be used only for the purpose of affecting the credibility of the witness, either by his own answers or by the evidence of others called to show that he did make the offer mentioned in the action, should he deny it.

The language of the opinion is, in some respects, unsatisfactory. It is argued at some length that the alleged offer to sell was wholly inconsistent with the truth of his testimony that he had previously sold to another party.

We quote the following from the opinion of the learned judge: "But if I am wrong in supposing that he might contradict the witness, still I entertain no doubt but that he had the right to have the question answered, although he may not have had the right to contradict him. It was legitimate cross-examination, and the party was entitled to the witness's answer. If he admitted making the offer, the defendant had accomplished his object. If he denied it, the answer would conclude him. I am of the opinion that the justice erred in rejecting the evidence, and that the judgment of the county court and of the justice should be reversed." What is meant by the language, "if he denied it, the answer would conclude him," in view of the general discussion in the opinion, it is difficult to say. We cannot see that the witness would be particularly concluded by the denial, as he claimed no interest in the property. If it is meant that the answer would conclude the defendant, it is at variance with the other portion of the opinion, for the argument is, principally, all to the effect that other witnesses could be called to contradict the declarations. So far as we have examined the books, all agree that

the declarations of one from whom a party obtains title to property, made after the transfer of title, and in derogation thereof, is inadmissible as against the vendee, with the exception that it may be admitted for the purpose of proving fraud on the part of the vendor, where there is evidence of a conspiracy to defraud, or made in the presence of the vendee, or when made so near the time of the sale as to become a part of the *res gestæ*.

In other cases it is held that whatever might have been said is hearsay, and therefore not competent evidence, as against the vendee: *Simpson v. Armstrong*, 20 Neb. 512; *Guidry v. Griot*, 2 Martin, N. S., 13; 14 Am. Dec. 193; *Weinrich v. Porter*, 47 Mo. 293; *Bogert v. Phelps*, 14 Wis. 95; *Kennedy v. Divine*, 77 Ind. 490; *Miner v. Phillips*, 42 Ill. 122; *Visher v. Webster*, 18 Cal. 58; *Martin v. Reeves*, 3 Martin, N. S., 22; 15 Am. Dec. 154; *Scheble v. Jordon*, 80 Kan. 353. It was, therefore, error for the district court to admit the testimony for the purpose of affecting the title of the plaintiff in error. But the court gave to the jury the following instruction:—

“The jury are instructed that the statement of Lawrence Holland, in the month of June, 1886, that he would turn over the Manley lumber-yard to the Commercial Bank of Weeping Water, was admitted in evidence for the sole purpose of affecting the credibility of the said Lawrence Holland as a witness, and not for the purpose of proving the title to the property by such statements.”

By this instruction the consideration of the testimony objected to was withdrawn from the jury, except so far as it might be considered for the purpose of affecting the testimony of Lawrence Holland. Or in other words, so far as it might be considered as tending to his impeachment. It then becomes necessary to inquire whether or not the testimony of Travis, Roberts, and Wooley was competent for that purpose. As we have seen, this evidence consisted of no declarations made by Lawrence Holland which could in any way impeach the validity of plaintiff's title to the property in dispute, nor is it essentially inconsistent with his testimony that he had transferred the property to plaintiff. There is no declaration that the property had not been sold, nor that it had not been delivered to plaintiff by the witness, except so far as it might be inferred from the alleged offer to turn it over to the Commercial Bank in payment of his indebtedness to it.

In *Kennedy v. Divine*, *supra*, it is said: “The general rule

is, that the statements made by the grantor, after he has parted with his title, tending to impeach his grantee's title, are inadmissible: *Garner v. Graves*, 54 Ind. 188; *Tedrowe v. Esher*, 56 Id. 443. There is an exception to the rule, where the grantor and grantee conspire together to defraud third persons. In such case a statement made by either is admissible against the other: *Caldwell v. Williams*, 1 Id. 405; *Tedrowe v. Esher*, 56 Id. 443. In such case the conspiracy must be made out before the statement is admissible."

In *Bogert v. Phelps*, 14 Wis. 95, the declarations of Hughes, the vendor of the property in question, were made five days after the sale, and were received in evidence, and for that reason the judgment of the trial court was reversed. The court, in the opinion, says: "The declarations of the vendor are received as evidence to establish fraud in him, but not in the vendee. In order to affect the latter, his knowledge of and participation in the fraud of the vendor must also be proved. The declarations of the vendor, to be admissible, must be a part of the *res gestae*. When possession is delivered, and transfer complete, they must be made at or near the time of the sale. It may not, perhaps, be material whether they are made shortly before or shortly after the sale, if made so near the time of it as fairly to indicate what was passing in his mind. They are facts connected with the main transaction which tend to show the motive of the vendor, and are of more or less weight according to the circumstances of each particular case: *Groves v. Steel*, 2 La. Ann. 482; *Martin v. Reeves*, 3 Martin, N. S., 23; *White v. Chadbourne*, 41 Me. 158. If they are so remote as not to be indicative of the thoughts of the vendor at the time of the sale, or that they may have been deliberately made for the purpose of disparaging the vendee's title, they are inadmissible. Here they were made at a different place, and so long after the sale as to make it clear they should have been excluded."

The well-established rule is, that a witness may be contradicted as to statements previously made which are at variance with his testimony upon the witness-stand, providing his attention is first called to the alleged statements, in order that he may admit, explain, or deny: *Reynolds's Stephens on Evidence*, 184. But in order to admit proof of such contradictory statements, after calling the attention of the witness to them, the inquiry must be limited to such evidence as is relevant to the cause, for he cannot be contradicted on collat-

eral matters: Best's Principles of Evidence, 685; Wharton on Evidence, 551, and cases cited; 2 Phillips on Evidence, Cowan and Hill's and Edwards's Notes, 756 (*903); 4 Phillips on Evidence, Cowan and Hill's Notes, pt. 2, 715.

As stated in the latter authority, the statement to be drawn out on cross-examination, with a view to establish a contradictory statement by the adverse witnesses with respect to the issue, must be limited to fact as distinct from one of opinion.

The issue presented was, whether or not Holland had sold the property in dispute to plaintiff. He testified, substantially, that he had. The contradictory statement, to which his attention was called, and for the purpose of proving which other witnesses were examined, was, substantially, to the effect that he had not. This, in *Knight v. Forward*, *supra*, was held to be a contradictory statement, the language of the court being, as we have hereinbefore quoted, that it was wholly inconsistent with the truth of the evidence which he had given. We think, therefore, there was no error in submitting the testimony to the jury for the purposes stated in the instruction.

It is insisted that the verdict of the jury is not sustained by sufficient evidence. This presents the same question passed upon and decided in this case as reported in 22 Neb. 216. It is contended that the defendant in error, who was the sheriff of Cass County, failed to justify his possession. He introduced in evidence the affidavit, order of attachment, and return thereon, including the inventory and appraisement. No further evidence was offered for this purpose.

In the former opinion in this case we quoted with approval the following, from the opinion of Judge Cobb, in *Oberfelder v. Kavanaugh*, 21 Neb. 483: " ' When the officer attaches property found in the possession of the defendant, he can always justify the levy by the production of the attachment writ, if the same is issued by a court or officer having lawful authority to issue it, and be in legal form. But when the property is found in the possession of a stranger claiming title, the mere production of the writ will not justify its seizure thereunder; the officer must go further, and prove not only that the attachment defendant was indebted to the attachment plaintiff, but that the attachment was regularly issued.' . . . The attachment being against a third party, in whom defendant alleged ownership, the rule above stated would have required proof ' not only that the attachment defendant was indebted

to the attachment plaintiff, but that the attachment was regularly issued.' "

We quote further from *Oberfelder v. Kavanaugh*, 21 Neb. 491, as follows: "Some courts have made a distinction between attachments issued by courts of general and those of limited jurisdiction. It may be doubted, however, whether there is any difference under a statute like ours, where the authority to issue an order of attachment by any court is limited to the special cases therein provided for, and in which the plaintiff shall conform to certain conditions precedent, amongst others that of filing an affidavit alleging certain facts therein indicated. It therefore follows that, in order to justify the seizure by virtue of an attachment of goods found in the possession of and the title to which is claimed by a stranger against whom no element of estoppel exists, the party so justifying must both allege and prove not only the issuing of the attachment, but every material fact and condition necessary to the regularity of its issue."

This being an action in replevin, the answer, consisting of a general denial, would be sufficient, but the proof would not be thereby limited. It was, therefore, necessary that it be shown by the introduction of the pleadings, or otherwise, that an action was pending, that an affidavit for attachment had been filed, that the indebtedness existed, and that the order had been regularly issued: *Thornburgh v. Hand*, 7 Cal. 554. It was not shown that an action was pending in which the writ had issued, and therefore the verdict of the jury was not sustained by sufficient evidence.

A number of other questions are presented, but it is not deemed necessary to examine them further, as they will probably not arise upon another trial.

The judgment of the district court is therefore reversed, and the cause remanded for further proceedings according to law.

VENDOR AND PURCHASER. — Declarations of a vendor, not made in the presence of the vendee, are competent to show a fraudulent intent of the former in making a conveyance to the latter: *Guidry v. Grivot*, 2 Martin, N. S., 13; 14 Am. Dec. 193, and note 195, with reference to when declarations of a vendor are admissible as against his vendee. And so the acts as well as the declarations of a fraudulent vendor are admissible to show his own fraud, even when such acts happened after the sale, and not in the presence of the vendee: *Martin v. Reeves*, 3 Martin, N. S., 22; 15 Am. Dec. 154, and note 155; *Horton v. Smith*, 8 Ala. 73; 42 Am. Dec. 623, and extended note 631 et seq. But acts and declarations of a grantor or vendor subsequent to his

deed or transfer cannot ordinarily be received in evidence against the grantee or vendee: *Dudley v. Hurst*, 67 Md. 44; 1 Am. St. Rep. 268; *Royal v. Chandler*, 79 Me. 266; 1 Am. St. Rep. 306, and note 306; *Baker v. Haskell*, 47 N. H. 479; 93 Am. Dec. 455; *Purdy v. Coar*, 109 N. Y. 448; 4 Am. St. Rep. 491; *Paige v. Cagwin*, 7 Hill, 361; 42 Am. Dec. 68, and note 80, 81; *Beechman v. Montgomery*, 14 N. J. Eq. 106; 80 Am. Dec. 229; *Galland v. Jackman*, 26 Cal. 79; 85 Am. Dec. 172; *Felder v. Bonnett*, 2 McMull. 44; 37 Am. Dec. 545; *Settle v. Alison*, 8 Ga. 201; 52 Am. Dec. 393; compare *Bush v. Roberts*, 111 N. Y. 478; 7 Am. St. Rep. 741.

OFFICERS, JUSTIFICATION OF ACTS BY THEIR PROCESS. — This question is the subject of an extended note to *Savacool v. Boughton*, 21 Am. Dec. 190-209.

REPLEVIN OF PROPERTY IN THE HANDS OF OFFICERS: *Relley v. Haynes*, 38 Kan. 269; 5 Am. St. Rep. 737, and note 741; *Bankins v. Greer*, 38 Kan. 343; 5 Am. St. Rep. 751, and note 754.

LEVY v. YERGA.

[36 NEBRASKA, 764.]

ADVERSE POSSESSION OF LAND INCLOSED BY MISTAKE, EFFECT OF. — Where a person, by mistake, incloses land of another, claiming it as his own, up to certain fixed monuments and boundaries, his actual and uninterrupted possession as owner, for the period prescribed by the statute of limitations, will give him a good title to the land so inclosed. And such possession is in no way affected by the fact that, during a portion of the time, he leased the adjoining land from the former owner of the strip inclosed.

EJECTMENT. The opinion states the case.

George F. Brown and William D. Beckett, for the plaintiff in error.

Kennedy and Gilbert, for the defendant in error.

RESE, C. J. This is an action in ejectment for the possession of a narrow strip of land within the inclosure of defendant, and which it is alleged is the property of plaintiff in error, the adjoining land-owner.

The answer of defendant in error denied the plaintiff's ownership, averred ownership in defendant, and alleged that he had "been in the lawful, open, notorious, peaceable, exclusive, and continuous possession of said premises for the period of more than ten years prior to the commencement" of the suit.

A trial was had to the court without the intervention of a jury, which resulted in a general finding and judgment in favor of the defendant in the action.

It is conceded by plaintiff that defendant has been in pos-

session of the property for more than ten years prior to the commencement of the action, and that if such possession was notorious, and hostile to plaintiff and his grantors, that the statute has run. But it is insisted that such is not the possession of defendant, but that his inclosure was only intended to reach to the true line, and that his possession has been only with reference thereto; that his occupation of the land belonging to plaintiff and his grantors has been solely by mistake, and that defendant's claim of ownership extended only to the land described in the deed, the property being described by metes and bounds.

We have carefully examined the evidence submitted to the trial court, and find that sufficient evidence was submitted to justify a finding that defendant's occupation has been with reference to fixed boundaries, existing at the time of his purchase, and which it was supposed was within the actual purchase made by him, and without reference to the particular land described in the deed. There is proof that, about the time of the purchase, the land was surveyed, and that, by such survey, it was found that a ditch, which had been previously excavated by an occupant, was upon the line. And that, in the construction of defendant's fence, he built with reference to said ditch as the line, placing this fence immediately inside of it. And that the whole of his possession had been with reference to said ditch as his boundary line, and as a monument thereof. This ditch was constructed, perhaps, prior to the year 1856, and, as stated by one of the witnesses, was originally intended as a "ditch fence," upon that boundary line. While it appears the property has not been occupied during all this time, yet it is shown that, during the time it was occupied, it was with reference to the ditch referred to as the boundary line; that the occupancy has been continuous, and with reference to it, for more than ten years prior to the commencement of the action.

Under the rule stated in *Tex v. Pflug*, 24 Neb. 666, 8 Am. St. Rep. 231, and which we believe to be correct, the statute of limitation had run in favor of defendant at the time of the commencement of the action.

It is shown that, during the occupation of defendant, he leased from plaintiff's grantor the tract of land adjoining upon the west, which, it is alleged, included the strip referred to, and that for a number of years he had it inclosed for the purpose of a pasture, and that thereby he recognized the owner-

ship of plaintiff, and that the running statute was broken, his possession during that time not being adverse.

It is clearly shown by the evidence that, at the time of the lease referred to, and during the whole thereof, the land in question was inlosed by defendant as his own property; while it is true that he rented what was known as the Thompson tract, yet it is very evident that in the contract of lease, which was oral, and in which contract the particular strip referred to was not treated as a portion of the Thompson tract, nor was defendant's possession thereof in any manner changed from what it had been prior thereto.

The rule stated in *Tex v. Pflug, supra*, on this part of the case must control, and the decision of the district court, that the tenancy was not inconsistent with defendant's possession as owner, was correct.

The judgment of the district court is therefore affirmed.

ADVERSE POSSESSION — MISTAKE AS TO BOUNDARIES. — One who, by mistake as to boundaries, enters upon realty, and occupies it, thinking it is embraced in his title, and claiming it as his own for the requisite statutory period, becomes invested with title thereto by his adverse possession: *Cawfield v. Clark*, 17 Or. 473; 11 Am. St. Rep. 845, and cases cited in note 845; *Tes v. Pflug*, 24 Neb. 666; 8 Am. St. Rep. 231, and note 233.

UNION PACIFIC RAILWAY COMPANY v. RASMUSSEN.

[25 NEBRASKA, 510.]

SPEED OF RAILWAY TRAIN, CITY ORDINANCE LIMITING, ADMISSIBILITY OF. —

In an action against a railway company to recover damages for the negligent killing of an animal while being driven over a public crossing in a city, the ordinance of the city limiting the speed of trains within the city limits to six miles an hour is competent evidence for the jury in passing upon the question of negligence.

KILLING OF STOCK IS PRESUMED TO HAVE BEEN DONE THROUGH NEGLIGENCE of a railway company, when the train by which the killing was

done was at the time running through a city at a greater rate of speed than was permitted by the city ordinance, if it be shown that a train running at a less speed would not have caused the injury.

FAILURE OF RAILWAY COMPANY TO RING BELL AND SOUND WHISTLE before trains reach a public crossing, as required by statute, is a proper matter to be considered by the jury in determining the question of the company's negligence.

ACTION for damages. The opinion states the case.

J. M. Thurston, W. R. Kelly, and J. S. Shropshire, for the plaintiff in error.

Frick and Dolezal, for the defendant in error.

REESER, C. J. This action was instituted by defendant in error against plaintiff in error, to recover the value of a cow alleged to have been negligently killed by the agents and employees of plaintiff in error, while running and operating an engine and train of cars over the line of its road through the city of Fremont.

The cow is alleged to have been negligently killed on the twenty-first day of July, 1887, while being lawfully driven over the public crossing within the city limits in said city, and that the negligence consisted of the careless management of the train, and by running at a reckless rate of speed.

The answer denied the allegations of the petition, and alleged negligence on the part of defendant in error.

The reply was a general denial.

The trial in the district court resulted in a verdict in favor of defendant in error for thirty-five dollars, as the value of the cow which was killed, and upon which verdict the judgment was rendered.

One of the assignments of error is, that the verdict was not sustained by sufficient evidence, and was contrary thereto.

The testimony before the jury was conflicting in many respects, but there was sufficient to sustain a finding that the cow was being driven across the track of plaintiff in error at the point where the railroad crosses a street, and that the train of cars was at that time approaching, and that the cow was caught and thrown from the track and injured, so that she was worthless, and had to be killed. There was also sufficient evidence to sustain a finding that the train was running at that time at a very rapid rate of speed, although passing through a somewhat densely settled portion of the city of Fremont.

One witness testified that it was running as fast as a passenger train usually runs; another, that it was going at full speed; and another, that it was running pretty fast. The engineer testified that the train was running at the rate of about six miles per hour; but there were two witnesses called for the purpose of impeaching his testimony, who testified that upon a trial in the inferior court he testified, while upon the stand as a witness, that the train was running at the rate of fifteen to eighteen miles per hour.

While it is true that the engineer was, perhaps, better qualified to judge of the rate of speed than the other witnesses, yet the jury were the sole judges of the weight of their testimony, and their finding in that particular could not be molested.

The question of the negligence of the railroad company, owing to the rate of speed at which the train was alleged to have been running, was submitted to the jury by proper instructions, and considering the constant use of that particular crossing, as testified to by the witnesses, the number of inhabitants along the side of the track for a considerable distance either way, and all the circumstances in connection with the case, were sufficient to sustain a finding of negligence on the part of plaintiff in error.

Upon the subject of contributory negligence upon the part of defendant in error, the verdict of the jury must be taken as final, for there was nothing that transpired upon his part, or upon the part of those having the cow in charge at that particular time, which would constitute negligence *per se*, and that question having also been submitted to the jury, with proper instructions for their guidance, we must take their finding as conclusive.

There is no doubt but that a duty rests upon all persons, desiring to cross the track with property which may be injured, to exercise reasonable care in so doing. But this obligation is mutual, and must also be observed by the employees of a railroad company in running a train of cars through a city or town. It was shown by the ordinances of the city, introduced upon the trial, that the rate of speed for trains should be six miles per hour. There is no doubt but that plaintiff's train, at the time of the occurrence of the accident, was running at a much greater rate of speed.

It is insisted that the court erred in admitting the ordinances of the city fixing this rate of speed as the maximum. In this we think the court did not err. It was competent for the jury, in passing upon the question of negligence, to know the rate of speed at which plaintiff in error was entitled to run its trains. Had it been shown upon the trial that they were within the limit fixed by ordinance, negligence could not be inferred from the mere act of running the train. But, upon the contrary, if the train was greatly exceeding the fixed rate, it was competent for the jury to consider, as tending to prove negligence: *Toledo etc. R. R. Co. v. O'Connor*, 77 Ill. 391; *Wright v. Malden etc. R. R. Co.*, 4 Allen, 283; *Correll v. Burlington etc. R. R. Co.*, 38 Iowa, 120; 18 Am. Rep. 22.

An ordinance was introduced by plaintiff in error to show that cattle were not permitted to run at large within the city. And it is insisted that the fact that the cow which was killed

was permitted to run at large was negligence on the part of the owner, defendant in error.

This question does not necessarily arise in the case, for it was shown by the testimony of one witness that the boys who had charge of the cow were returning her from the pasture, had her in charge at that time, and sought to get her out of the way of the train, but that, owing to the rapid rate of speed at which the train was running, they were unable to do so.

It is insisted that as the proof showed that the cow was in charge of two boys who were hired to take her to and from the pasture daily, that they were the bailees of defendant in error, and that his right of action would be against them. This might be true had the cow been killed by reason of their negligence, but since the jury found that there was no negligence on the part of the persons in charge of the cow at the time she was killed, we do not see that it is a proper question to consider in this case.

It is next contended that the court erred in giving certain instructions to the jury, among which is instruction No. 6, which we here copy:—

"The jury are instructed that where a railroad company runs its trains through a city at a greater rate of speed than is permitted by the ordinance of the city, and stock is killed by such train while so running, the killing will be presumed to have been done through the negligence of the company, if the jury, from the evidence, believe that a train running at a less speed than said train was then running would not cause the injury. It is for the jury to find, from the evidence, whether the train of the defendant was being run at the time of the injury at a speed greater than six miles an hour."

The objection is to that part where it is said that the killing "will be presumed to have been done through the negligence of the company," etc.

This instruction bases the presumption of negligence upon the fact, if found, that a train running at a less speed would not have caused the injury. The case is therefore brought within the rule stated in *Steves v. Oswego etc. R. R. Co.*, 18 N. Y. 422, cited by plaintiff in error. In that it is made to depend upon the condition just mentioned.

The instruction is quite similar to one given in *Correll v. Railroad Co.*, *supra*, with the exception that in that case the running of the train faster than permitted by ordinance was said to have been evidence of negligence. But this language

is followed by the words, "and the defendant is liable unless excused by the alleged negligence of plaintiff's servants." The instruction in that case was held correct, and Miller, C. J., in writing the opinion, after citing other cases sustaining the doctrine, says that he has found but a single case holding a contrary doctrine, and that is *Brown v. Buffalo etc. R. R. Co.*, 22 N. Y. 191. He also cites Shearman and Redfield on Negligence, where they say of that case: "We do not think this decision will be followed in any other state": Shearman and Redfield on Negligence, sec. 484, note 2. The writer of the opinion, continuing, says: "It was rendered by a bare majority of the court of appeals, and has been subsequently justly criticised by the same court in *Jetter v. Railroad Co.*, 2 Keyes, 154," in which it is said that the case stands, "upon grounds altogether too doubtful to justify its application to cases not strictly within it. The opinion defines the distinctions between civil remedies and criminal punishments, and the authorities cited by them go no further than to hold that, where a specific penalty is described by a law forbidding an act not *per se* criminal, the act is not otherwise punishable as a public offense. It failed to recognize the axiomatic truth that every person, while violating an express statute, is a wrong-doer, and as such is *ex necessitate* negligent, in the eye of the law, and that every innocent party whose person is injured by the act which constitutes the violation of the statute is entitled to the civil remedy for such injury, notwithstanding any redress the public may also have."

In two other instructions the court quoted section 104 of chapter 16 of the Compiled Statutes, which requires the ringing of the bell and sounding of the whistle before reaching public crossings, and instructed the jury that a failure to comply with the requirements of this statute was "a matter properly to be considered by the jury in determining whether defendant was guilty of negligence in killing the cow."

It is said that the bell was rung, and that the cow was not killed upon the crossing. Upon the subject of the ringing of the bell, and as to the exact location at which the cow was killed, the cause was submitted to the jury upon conflicting testimony, some witnesses testifying that the cow was struck at the crossing, and others that she was feeding by the track near the crossing. The engineer in charge of the train testified that the bell was rung continuously, while others who were near by testified that it was not. The cause was sub-

mitted to the jury upon these two theories, and the instruction complained of was not erroneous.

From a careful examination of the case, we are unable to find any error requiring the reversal of the judgment, and it will, therefore, be affirmed.

RAILROADS. — The running of a train within city limits at a speed prohibited by ordinance is of itself negligence: *Correll v. Burlington etc. R. R. Co.*, 38 Iowa, 120; 18 Am. Rep. 22; *Virginia etc. R'y Co. v. White*, 84 Va. 498; 10 Am. St. Rep. 874, and note 883; *Schlerath v. Missouri etc. R'y Co.*, 96 Mo. 500. The fact that a railway train was running through a city at a greater speed than was permitted by the city ordinance may be considered by the jury in determining whether the company was negligent: *Blanchard v. Lake Shore etc. R'y Co.*, 126 Ill. 416; 9 Am. St. Rep. 630. Nor is a railway company excused from the consequences of running trains at a great speed through streets in a populous city by the impossibility of its servants to control the powers which propel the trains: *Parsons v. New York etc. R. R. Co.*, 113 N. Y. 355; 10 Am. St. Rep. 450.

RAILROADS MUST RING A BELL or sound a whistle when approaching a crossing: Note to *Durbin v. Oregon etc. R. R. & Nav. Co.*, 11 Am. St. Rep. 796; *Louisville etc. R. R. Co. v. Hall*, 87 Ala. 708; ante, p. 84, and note 93, 94.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
NEW HAMPSHIRE.

EDGERLY v. CONCORD.

[62 NEW HAMPSHIRE, 2.]

MUNICIPAL CORPORATIONS. — MUNICIPALITY CANNOT BE MADE LIABLE, in the absence of a statute giving the remedy, for an injury arising from a negligent use of its property, from which it receives, in its corporate capacity, no special benefit, or from a negligent use of its property by its officers, not acting as agents or servants of the corporation, but as public officers whose duties are defined by general law.

MUNICIPAL CORPORATIONS — LIABILITY FOR NEGLIGENCE OF DUTY IN RESPECT TO USE OF WATER FROM HYDRANTS. — A city owned water-works constructed under a legislative charter for supplying water to the inhabitants, and for extinguishing fires. The management of the works was under the control of a board of water commissioners, and hydrants designed for use in extinguishing fires were under the control of the public fire department. In order to determine upon a suitable location for an engine-house for a steam fire-engine, the firemen, at the request of the mayor, and in his presence and that of the city council, tested the capacity of a hydrant. A person traveling upon the street at the time was injured by reason of his horse taking fright at the stream of water thrown from the hydrant. In an action against the city, claiming damages for the injury, it was held that the plaintiff could not recover, in the absence of a statute giving the remedy.

ACTION in case. The plaintiff sought to recover damages against the city of Concord for an injury caused by his horse taking fright at a stream of water thrown from a hose attached to one of the city's public hydrants. The water was thrown for the purpose of testing the capacity of the hydrant, with a view to locating an engine-house; and the test was made, at the request of the mayor, by the chief engineer of the fire department, with two firemen acting under his direction, and the

mayor and city councils witnessed the exhibition. The city owns the water-works, which are under the exclusive control of a water commissioner, and the hydrants for extinguishing fires are under the control of the fire department. The defendant denied liability.

W. L. Foster, J. Y. Mugridge, and J. H. George, for the plaintiff.

Sanborn and Clark, for the defendants.

ALLEN, J. It has been decided, on a former transfer of this case, that the action could not be maintained upon a declaration for damage from a defective highway: *Edgerly v. Concord*, 59 N. H. 78. After amendment of the declaration alleging the careless use of the hydrant by certain officers of the city as the cause of the injury, it was again decided that the plaintiff could not recover upon a declaration which contained no averment of the defendants' duty to prevent the negligent use of the hydrant complained of: *Id.* 341. The claim presented at this time, on a further amendment of the declaration and a statement of facts agreed upon for the purposes of the case, is, that the plaintiff's injury arose from the defendants' unlawful and negligent use of one of their hydrants.

The rule that it is the duty of every one to so use his own that another shall not be injured thereby, and that he shall be liable in damages for every injury inflicted through a neglect of such duty, has not the general application to municipal corporations that it has to private corporations and natural persons: 2 Dillon on Municipal Corporations, 8d ed., sec. 948; Cooley on Torts, 619, 620. The purposes for which a municipal corporation is created, and its powers and duties, are largely of a public nature, and its acts are, to a great extent, legislative and judicial. The relations of an individual with such a body are so different from his relations with other individuals and with private corporations that questions of liability for injuries arising from a neglect of public corporate duty are rarely solved by the application of a general rule, but each case must be determined, as it arises, on its own facts, and by an interpretation of the statute creating the corporation and defining its powers and duties: 2 Dillon on Municipal Corporations, sec. 948; *Lloyd v. Mayor etc. of New York*, 5 N. Y. 369, 375; 55 Am. Dec. 347; *Mersey Dock Cases*, L. R. 1 H. L. 93.

As a part of the governmental machinery of the state, municipal corporations legislate and provide for the customary

local conveniences of the people, and in exercising these discretionary functions, the corporations are not called upon to respond in damages to individuals, either for omissions to act, or for the mode of exercising powers conferred on them for public purposes, and to be exercised at discretion for the public good. For injuries arising from the corporation's failure to exercise its public, legislative, and police powers, and from the manner of executing those powers, there is no remedy against the municipality, nor can an action be maintained for damages resulting from the failure of its officers to discharge properly and effectually their official duties: *Eastman v. Meredith*, 36 N. H. 284; 72 Am. Dec. 302; *Ray v. Manchester*, 46 N. H. 59, 60; 88 Am. Dec. 192; *Hardy v. Keene*, 52 N. H. 370, 377; *Thayer v. Boston*, 19 Pick. 511; 31 Am. Dec. 157; *Hafford v. New Bedford*, 16 Gray, 297; *Fisher v. Boston*, 104 Mass. 87; 6 Am. Rep. 196; *Hill v. Boston*, 122 Mass. 344; 23 Am. Rep. 332; *Barbour v. Ellsworth*, 67 Me. 294; *Judge v. Meriden*, 38 Conn. 90; *Jewett v. New Haven*, 38 Id. 368; 9 Am. Rep. 382; *Hutchinson v. Concord*, 41 Vt. 271; 98 Am. Dec. 584; *Grant v. Erie*, 69 Pa. St. 420; 8 Am. Rep. 272; *Davis v. Montgomery*, 51 Ala. 189; 23 Am. Rep. 545; Cooley on Torts, 620, 621; 2 Dillon on Municipal Corporations, secs. 949-951, 953-955. No private action, in the absence of a statute giving it, can be maintained against a city for the neglect of a public duty imposed upon it by law for the benefit of the public, and from the performance of which the corporation receives no profit or advantage: *Hill v. Boston*, 122 Mass. 344; 23 Am. Rep. 332, and cases cited; 2 Dillon on Municipal Corporations, sec. 976. To charge a corporation with damages for injuries arising from misfeasance and neglect of duty, no statute fixing the liability, there must be acts positively injurious committed by authorized agents or officers in the course of the performance of corporate powers, or in the execution of corporate duties, in distinction from those done in a public capacity as a governing agency. If the corporation maintains a private nuisance, and causes special damage thereby, or invades any right of property in the performance of an authorized act, the injured person is entitled to his action: *Eastman v. Meredith*, 36 N. H. 284, 291, 292, 296; *Groton v. Haines*, 36 Id. 388; *Gilman v. Laconia*, 55 Id. 130; 20 Am. Rep. 175; *Mayor of New York v. Furze*, 3 Hill, 612; *Bailey v. Mayor of New York*, 3 Id. 531; 38 Am. Dec. 689; *Lloyd v. Mayor of New York*, 5 N. Y. 369, 375; 55 Am. Dec. 347; 2 Dillon on Municipal Corporations, sec.

966. The act complained of must be one which the corporation is empowered to do, and not wholly *ultra vires*, and the officer committing the act must be the agent or servant of the corporation acting within the scope of his authority, and not an independent public officer whose sole powers are given and defined by statute: *Thayer v. Boston*, 19 Pick. 516; *Perley v. Georgetown*, 7 Gray, 464; *Fisher v. Boston*, 104 Mass. 87; 6 Am. Rep. 196; *Tolman v. Marlborough*, 3 N. H. 57, 59; *Wood on Master and Servant*, 17; 2 *Dillon on Municipal Corporations*, sec. 974. Municipal corporations may be liable for acts done under a grant of special powers not held under any general law, and from the execution of which some special profit or advantage is derived: *Rowe v. Portsmouth*, 56 N. H. 293; 22 Am. Rep. 464; and generally for injuries received from the negligent management of property not held for strictly public purposes, corporations are liable in the same way and to the same extent as individuals: *Oliver v. Worcester*, 102 Mass. 489, 499; 3 Am. Rep. 485; *Richmond v. Long's Adm'rs*, 17 Gratt. 375; *Petersburg v. Applegarth*, 28 Id. 321; 26 Am. Rep. 357.

The act for which the plaintiff claims damages was an experimental use of a public hydrant, with hose attached, by firemen of the city acting under the direction of the chief engineer, who made the experiment at the request of the mayor and in the presence of the city councils. For all purposes connected with the use of water for extinguishing fires, the management and control of the hydrants were with the fire department, under the direction of the board of engineers. The law provides that "the selectmen, being authorized by vote or by-law of any town, shall appoint a chief engineer and assistant engineers and clerk of the fire department, who shall respectively have the powers and perform the duties of the chief and other firewards and their clerk, and, as a board, shall have the powers and perform the duties of the board of firewards": Gen. Stats., c. 96, sec. 21. The duties of firewards are defined to be to "have at all times the control of all fire-engines, fire-hooks, hose, and all other implements designed or used for the extinguishment of fire in such town, and of all persons appointed to serve in any engine, hose, or ax company, or other association, whose duty shall be to aid in extinguishing fires, in all things appertaining to their appointment": Id., c. 96, sec. 2. By sections 13 and 14 it is made the duty of firewards to appoint firemen, whose duties in relation to property in their charge shall be subject to the

approval of the firewards. And by section 11 it is provided that the chief fireward shall see that all apparatus provided for the extinguishment of fires is kept in repair, and "cause all cisterns and sources of water prepared for the fire department to be fully supplied and kept in order." The city councils, having the powers of towns in relation to like subjects, established a fire department, and provided for a board of engineers, clerk, and firemen, who were duly appointed and became possessed of all the powers and subject to all the duties imposed by the general law upon the firewards and firemen of towns. The engineers being appointed, their duties were defined by the general law, and not by any law, ordinance, or vote of the city. They were public officers, amenable to law for their conduct, and not under control or direction of the city. They were not agents or servants of the city in any such sense as to bind it by their acts, or make it liable for their defaults: *Hafford v. New Bedford*, 16 Gray, 297; *Fisher v. Boston*, 104 Mass. 87; 6 Am. Rep. 196; *Jewett v. New Haven*, 38 Conn. 368; 9 Am. Rep. 382; *Torbush v. Norwich*, 38 Conn. 225; 9 Am. Rep. 395; *O'Meara v. Mayor of New York*, 1 Daly, 425; *Bowditch v. Boston*, 101 U.S. 16; *Shearman and Redfield on Negligence*, 139; 2 *Dillon on Municipal Corporations*, sec. 976. On the same principles it has been held that various classes of municipal officers, appointed by the municipality in obedience to an act of the legislature which prescribes their powers and duties, and from which the corporation, in its corporate capacity, receives no special benefit, are not agents of the corporation for whose tortious acts it can be made liable. Among these officers are superintendents of streets and highway surveyors: *Hardy v. Keene*, 52 N. H. 370; *Small v. Danville*, 51 Me. 359; *Walcott v. Swampscott*, 1 Allen, 101; *Barney v. Lowell*, 98 Mass. 570; police-officers: *Buttrick v. Lowell*, 1 Allen, 172; 79 Am. Dec. 721; *Elliot v. Philadelphia*, 75 Pa. St. 347; 15 Am. Rep. 591; health officers: *Brown v. Vinalhaven*, 65 Me. 402; 20 Am. Rep. 709; *Ogg v. Lansing*, 35 Iowa, 495; 14 Am. Rep. 499; commissioners of charities appointed by the mayor: *Maximilian v. Mayor of New York*, 62 N. Y. 160; 20 Am. Rep. 468; inspectors of steam-boilers appointed by the city: *Mead v. New Haven*, 40 Conn. 72; 16 Am. Rep. 14.

The public hydrants were constructed for use in extinguishing fires, were "sources of water" for that purpose, and a part of the machinery under the control and management of the engineers. Though water commissioners were appointed who

had the control and management of the water-works constructed under the act of 1871, their powers and duties did not conflict with the powers given by statute to the board of engineers, which included the control and management of the hydrants as sources of water for the extinguishment of fires. The mayor's request that the chief engineer make an exhibition of the force of the hydrants was not an order of the city, and did not change the duties of the engineer and firemen, nor add any new ones to those imposed by statute.

The engineer and firemen, within the scope of their statutory duties, could in many ways use the hydrants and hose at other times and places than at fires. The legal requirement that the chief engineer should keep all apparatus furnished in repair, and all sources of water fully supplied and in order, made it necessary to examine the hydrants and test their power. That the firemen should be possessed of skill, and consequent usefulness and efficiency in extinguishing fires, frequent practice in operating the hydrants with hose, and making practical tests of their force in particular places, was necessary. And for the purpose of informing the city government of the relative needs of different localities in respect to fire apparatus and water for extinguishing fires, it would not seem that they were exceeding or departing from their line of prescribed duty in exhibiting the force of water, at the hydrant in question, to the mayor and city councils. In either view, whether or not the engineer and firemen acted within their line of duty, the acts were of a public nature, done as public officers, and not as agents of the defendants, and the defendants could not on that account alone be liable.

If the act which occasioned the injury was *ultra vires*, wholly outside the corporate powers of the defendants, they could not be liable, even though it might appear that the request of the mayor was a command, and the presence of the city councils witnessing the act was a ratification or adoption of it by the city government. The city councils could not legally ratify nor bind the city by the adoption of an act which the city had no power to perform: 2 Dillon on Municipal Corporations, sec. 698. But if the act complained of was within the corporate powers of the defendants, and commanded, ratified, or adopted, so as to become an act of the city, it was an act of a public nature, discretionary and legislative, for the injurious consequences of which the defendants would not be chargeable. The city councils were officially engaged in the consid-

eration of the question where to locate a house for a fire-engine. The exhibition of the hydrant's power was upon a "view" by the councils, the better to enable them as judges to legislatively determine the question before them. Just what information they chose to obtain on the subject, and what mode they would adopt in obtaining it, was discretionary with them. The city could not be made liable for any error or mistake in determining the location of the engine-house, nor for an injury arising from the method used to obtain competent evidence on the subject. If the act was within the chartered, legal, corporate powers of the city, it was an act of a public character, legislative and discretionary, and for the manner of exercising such a power the city could not be made liable.

It is claimed by the plaintiff that the act empowering the city to introduce water conferred special privileges on the defendants and their inhabitants, and is one from which the city, in its corporate character, receives special benefits in the way of rents and tolls for the use of the water, and thereby the duty is imposed of protecting individuals from injury arising from a negligent use of the privileges so conferred. Conceding this to be so, it does not appear that the doctrine has any application to this case. The act from which the injury arose was the use of a hydrant with hose attached, constructed for use in extinguishing fires, and under the control of the fire department, an independent branch of the city government. No toll, or rent, or special advantage accrues to the defendants in their corporate capacity for the use of the hydrants for such purposes, but a tax is laid for supporting the use. For the use of the water by individuals, for domestic and other purposes, an annual rent is paid or may be exacted. The use of the water from the hydrants is a public use, enjoyed in common by the people, and from which the city in its corporate capacity receives no special advantage; and in the absence of a statute giving the action, the defendants cannot be made liable for a neglect of duty in respect to such public use: *Hill v. Boston*, 122 Mass. 844; 28 Am. Rep. 382; *Parker v. Rutland*, 56 Vt. 224; *Peoples v. Detroit*, 28 Mich. 228, 237-239; 15 Am. Rep. 202; 2 Dillon on Municipal Corporations, secs. 966, 976, 980, 981.

The local character of the public expense of the water-works, and of the election of the public officers who made the experimental use of the hydrant and requested it to be made, and

the fact that the extinguishment of fires was not the sole purpose of the water-works, are immaterial, because the use complained of was made in the exercise of no other power than that of providing at the public expense for the protection of the public against fire. For every legal purpose of this case, the use complained of was as purely public as it would have been if the water-works had been constructed by the state, at the expense of the state, for the sole purpose of use by state officers in the extinguishment of fire without private remuneration, and the experiment had been made by state officers, legislative and administrative, in their consideration of the location of an engine-house to be built by the state. Of the use of the water-works for which tolls were paid, or of anything done in the business of providing for it, the plaintiff does not complain. Mere division of the state government into general and local does not make either part suable, and neither part is made liable for its uncompensated transaction of the public business of a fire department, by the circumstance that it is engaged in some other public business, the expense of which is borne by those specially benefited by it instead of the taxpayers.

In *Aldrich v. Tripp*, 11 R. I. 141, 23 Am. Rep. 484, claimed as an authority by the plaintiff, the city of Providence was held liable for an injury arising from a traveler's horse taking fright at a stream of water thrown across the street from a hydrant by employees of the water commissioners. The decision goes expressly on the ground that the commissioners, authorized by the charter granting the water-works, were not public officers but agents of the city, and that the hydrant was not being used for a public purpose, but the use was of a part of the city's property, from which a special benefit was derived by the city in its corporate capacity. On principle, and by a very great weight of authority, a municipality cannot be made liable, in the absence of a statute giving the remedy, for an injury arising from a negligent use of its property, from which it receives, in its corporate capacity, no special benefit, or from a negligent use of its property by its officers not acting as agents or servants of the corporation, but as public officers whose duties are defined by general law. On the facts stated, a case is not made which entitles the plaintiff to recover.

Case discharged.

MUNICIPAL CORPORATIONS. — In the absence of statute, a city cannot be held liable in a civil action for injury resulting from a neglect to keep its streets, highways, or bridges in repair: *Arkadelphia v. Windham*, 49 Ark. 139; 4 Am. St. Rep. 32, and cases collected in note 35; nor for personal injuries occasioned through the neglect of its officers to properly perform their duties: *Chope v. City of Bureka*, 78 Cal. 588; 12 Am. St. Rep. 113, and note; neither is a city liable for the acts of highway surveyors or the men employed by them engaged in the performance of duties imposed upon them by law to repair the highways: *Pratt v. Inhabitants of Weymouth*, 147 Mass. 245; but see *Sprague v. Tripp*, 13 R. I. 38; 43 Am. Rep. 11; *Aldrich v. Tripp*, 11 R. I. 141; 23 Am. Rep. 434, and cases in foot-note.

MUNICIPALITIES ARE NOT LIABLE for the acts of officers who are appointed or elected in obedience to a statute for the purpose of performing a public service, and from whose acts the municipality does not derive any special benefit in its corporate capacity: *Maximilian v. Mayor*, 62 N. Y. 160; 20 Am. Rep. 468, and cases cited in note 474; compare *Mead v. New Haven*, 40 Conn. 72; 16 Am. Rep. 14.

SAWYER v. MANCHESTER AND KEENE R. R. Co.

[62 NEW HAMPSHIRE, 185.]

MUNICIPAL CORPORATIONS — TOWNS — CONCLUSIVENESS OF RECORD. — The record made by the town clerk is conclusive of the facts therein stated, not only upon the town, but upon all the world, so long as it stands as the record. It is the only competent evidence of a vote of the town; and it cannot be amended according to the truth, to the destruction of rights acquired by one relying upon it in good faith, without notice of the error.

AMENDMENTS OF RECORD WHICH AFFECT VESTED RIGHTS OF THIRD PARTIES, or where injustice will be done to any one, cannot properly be allowed; and no reason exists for exempting towns from the operation of this rule.

MUNICIPAL CORPORATIONS — ACTION OF TOWN UPON QUESTION OF GRANTING AID TO BUILD RAILROAD. — Under an article in the warrant for a town-meeting "to see what sum of money the town will vote to raise and appropriate as a gratuity" to a railroad company, to build a railroad, "said road to be completed on or before" a day specified, the town may lawfully vote a gratuity upon condition that the road "be completed in a reasonable time."

FOREIGN attachment, the plaintiffs therein claiming to charge the trustee, the town of Hancock, for the amount of five per cent on the appraised valuation of the town for the year 1874. The warrant for a town-meeting, held January 25, 1875, contained the following article: "Second, to see what per cent of its last valuation, or what sum of money, the town will vote to raise and appropriate as a gratuity to the Manchester and Keene Railroad Company, if it will build a railroad, with suitable depots, at the village, or

within one half mile of the town hall in said town, said road to be completed on or before the first day of January, 1878." The town clerk recorded the vote of the town under this article as follows: "Voted on the second article of the warrant to raise five per cent of the present valuation of said town of Hancock as a gratuity to the Manchester and Keene railroad, if the company will build and complete a railroad into the village, or within one half mile of the town hall in said Hancock, with suitable depots for the convenience of its inhabitants and the public." At a meeting of the directors of the railroad company, held December 14, 1875, they "voted to accept and approve the action of the treasurer of this company in accepting the gratuity voted by the citizens of the town of Hancock to aid the construction of the Manchester and Keene railroad." At September term, 1878, and about one year after this suit was brought, it was ordered by the court, upon the application of the trustee, that the record of the vote be amended by adding thereto the words, "and complete the road on or before the first day of January, 1878." To this order the plaintiffs excepted. The road was in fact completed and opened for public travel August 14, 1878. An opinion in favor of the plaintiffs was announced at March adjourned term, 1879, and the trustee moved for a rehearing, upon the ground that the amendment asked was properly allowed, and that the vote as recorded could not be taken under said second article in the warrant.

G. Y. Sawyer and Sawyer, Jr., Chase and Streeter, and C. H. Burns, for the plaintiffs.

C. R. Morrison, Stevens and Parker, and A. W. Sawyer, for the trustee.

CARPENTER, J. It must be taken, for the purposes of the case, that the defendants built and completed the railroad, relying in good faith upon the vote of the town as originally recorded by the town clerk, but that the actual vote was as expressed in the amendment of the record allowed by the court. The question of chief importance is, whether the amendment can be properly allowed against the objection of the plaintiffs, and without the defendants' consent.

Towns have frequent occasion to transact business which their ordinary officers have no power to perform, and which can be done only by direct corporate action, or by special agents under authority conferred by such action: Gen. Laws,

c. 37; *Underhill v. Gibson*, 2 N. H. 352; 9 Am. Dec. 82; *Andover v. Grafton*, 7 N. H. 298; *Carlton v. Bath*, 22 Id. 559; *Rich v. Errol*, 51 Id. 350.

Direct corporate action must be taken by vote in open town-meeting, and a majority controls. The votes may be so nearly equally divided, that, with or without polling, it is difficult to determine with certainty what is the voice of the town, and the party declared defeated may honestly believe the declaration erroneous, as it possibly may be in fact. Motions and resolutions are not always presented in writing, and they may be amended in various particulars before their final adoption. The exact language in which they are expressed is generally material and important. If, whenever the action of the town is put in issue, it were left to be determined on the testimony of those present at the meeting, in many cases it could never be ascertained with reasonable certainty; the transaction of business dependent upon it would be impracticable, and in all cases the inconvenience would be intolerable. For this reason, among others, the law provides that in every town-meeting there shall be two officers sworn to the faithful discharge of their duties, — a moderator, who is required to “make a public declaration of all votes passed” (Gen. Laws, c. 39, sec. 3), and a town clerk, who is required to “record all votes passed by the town”: Id., c. 40, sec. 1. The record made by the clerk is conclusive of the facts therein stated, not only upon the town, but upon all the world, so long as it stands as the record. Its accuracy cannot be drawn in question collaterally. It can be contradicted or impeached only in proceedings instituted directly for the purpose, and to the end that it may be corrected. So long as it is in existence, and can be produced, it is the only competent evidence of the action of the town. If it is destroyed or lost, parol evidence may be received to show what it was, but not to prove what the vote was, except in so far as such proof may tend to establish the contents of the record: *Pickering v. Pickering*, 11 N. H. 144; *Greeley v. Quimby*, 22 Id. 335; *Harris v. School District*, 28 Id. 66; *Orford v. Benton*, 36 Id. 403; *Farrar v. Fessenden*, 39 Id. 288; *Hampstead v. Plaistow*, 49 Id. 96; *Monadnock Railroad v. Peterborough*, 49 Id. 294; *Bell v. Pike*, 53 Id. 473; *Hill v. Goodwin*, 56 Id. 441; *Saxton v. Nimms*, 14 Mass. 320; *Thayer v. Stearns*, 1 Pick. 112; *Taylor v. Henry*, 2 Id. 397; *Manning v. Gloucester*, 6 Id. 6; *School District v. Atherton*, 12 Met. 105; *Mayhew v. Gay Head*, 13 Allen, 129; *Morrison v.*

Lawrence, 98 Mass. 219; *Andrews v. Boylston*, 110 Id. 214; *Halleck v. Boylston*, 117 Id. 469; *Moor v. Newfield*, 4 Me. 44; *Samis v. King*, 40 Conn. 804, 805; *People v. Adams*, 9 Wend. 838; *People v. Zeyst*, 23 N. Y. 140.

It is immaterial whether the clerk in making the record act as the agent of the town, or as a public officer in the performance of a duty imposed by law. At any time before the rights of third persons have attached, a town may rescind its votes, or the record thereof, if erroneous, may be amended in accordance with the facts; but votes cannot be rescinded to the prejudice of rights which have accrued under them: *Mitchell v. Brown*, 18 N. H. 315; *Pond v. Negus*, 3 Mass. 230; 3 Am. Dec. 181; *Damon v. Granby*, 2 Pick. 345; *Nelson v. Milford*, 7 Id. 18; *Hunneman v. Grafton*, 10 Met. 454; *Withington v. Harvard*, 8 Cush. 66; *Hall v. Holden*, 116 Mass. 172; *Curnen v. Mayor*, 79 N. Y. 511; 1 Dillon on Municipal Corporations, secs. 228, 232, and cases cited. The question now is, whether the court can properly permit the erroneous record to be amended according to the truth, to the destruction of rights acquired under it in good faith, without notice of the error. Mistakes are inevitable, and their causes numerous. Considering the noise and confusion not infrequent in town-meetings, the liability of the moderator to misunderstand motions verbally submitted, or to err in declaring the result; of the clerk to mistake the declaration of the moderator; to misconceive the motion or the amendments adopted; or to fail to recollect or to record the exact language,—the wonder is that errors are not more frequent.

To permit the record to be altered or amended in accordance with facts found upon the testimony of witnesses, after individuals have dealt with the town and invested their money, or performed labor upon the faith of the vote as recorded, would produce the same mischief as if no record were required. No one could safely engage in transactions with a town, or with its special agents, without first ascertaining the accuracy of the record. In attempting to do this, the same difficulty would be met as if there were no record. An appeal to the recollection of those who were present when the vote was passed would generally afford the only means by which its truthfulness could be tested. The officers of the meeting might pronounce it correct, but their recollection would be no more authoritative, and might be no more reliable, than that of others. Should every person present be consulted, and

concur in declaring the record right, the assurance that it would not be shown to be incorrect when long afterward the town should be called upon to perform its contract might not be materially fortified. They might all be mistaken, and, with memories subsequently refreshed by circumstances, remember that they were mistaken. The possibility of such unanimity, both in the error and in its correction, is doubtless remote; but the mischief arising from the not improbable conflict of recollection would be little less. Men naturally and unconsciously incline to believe what they wish to believe,—what it is for their interest that the truth should be. The most intelligent, conscientious, and disinterested witness to long-past transactions often finds it difficult, if not impossible, to distinguish inference from recollection,—to separate facts which he comes to by a process of reasoning from those which he remembers,—and, if his personal interests are concerned, is not unlikely to reach a conviction that he recollects what in truth he only argues or infers from other facts must have existed.

For these and various other causes, the weight of procurable testimony might often be against the verity of the record when brought in issue long after the transaction dependent upon it, although at the time of the transaction its accuracy was confirmed by all the obtainable evidence. In all cases, the essential element of certainty would be wanting. Although the town's recorded vote should authorize the selectmen or special agents to borrow money, to employ counsel, or to buy or sell a town farm, should provide for the funding of its debt, the establishment of a library, park, or cemetery, the publication of an early history of the town, the erection of a monument, or for any other thing within its power (Gen. Laws, c. 87), no one could lend his money, act as counsel, buy of or sell to the town a farm, publish a town history, erect a monument, or render other services apparently warranted by the vote, with a certainty that he could hold the property he bought, recover the money he lent, the stipulated consideration for the property he sold, or compensation for his services, and by no care and prudence on his part could he make it certain. After the most painstaking and exhaustive examination in his power to make, his rights would still depend on the uncertain result of a future judicial finding of what the town's vote actually was, to be made necessarily upon the direct testimony of more or less hostile witnesses, in connection with the evidence

afforded by surrounding circumstances, and finally determined by a balance of the probabilities. Such a state of things would be as damaging to the corporations as to the individuals dealing with them; as detrimental to the public welfare as to private rights: *Saxton v. Nimms*, 14 Mass. 320, 321; *People v. Zeyet*, 23 N. Y. 145, 146. It makes no substantial difference whether the record may be impeached or modified by means of an amendment founded upon extrinsic evidence, or by such evidence without an amendment; the practical result in each case is the same. A record not conclusive until it is proved to be right, not reliable unless it is shown to be correct, would be no better than no record, and its tendency to mislead might make it worse than none. In the language of Ladd, J., in *Bell v. Pike*, 53 N. H. 478: "For all the practical uses of a record, it is no record at all. It lacks the fundamental attribute of verity, without which the first and most important definition of a record is not answered. It cannot form the basis of action anywhere, or for any purpose. It leaves the truth to be ascertained by an investigation of the antecedent facts upon which it purports to be based, as much as if nothing had been written." The law requires a record to the end that those who may be called to act under it may have no occasion to look beyond it; to avoid the mischief of leaving municipal corporate action to be proved by parol evidence; to make it certain that rights which have accrued under such action shall not be destroyed or affected by the always fallible and often wholly unreliable recollection of witnesses, however truthful and intelligent they may be. For similar reasons, the law requires conveyances of land, wills, certain contracts, and legislation to be in writing.

When a town, by its corporate vote, makes an offer or proposition, to be accepted or rejected by a person at his pleasure, substantial reasons might be given for requiring it to see, at its peril, that the proposition is correctly stated in the record, and for holding that after the recorded offer is accepted and acted upon, the town is estopped from amending it, or from availing itself of an amendment made according to the fact: *New Haven etc. R. R. Co. v. Chatham*, 42 Conn. 465. However this may be, and conceding that a town is no more responsible for the action of the clerk than is any person whose interests may be affected by the record, there is no reason why towns should stand in a more favorable position in respect to amendments than individuals who deal with them, or have

occasion to act on the faith of the record. Amendments of the record upon which a tax title is founded, of levies upon execution, or of a sheriff's return, are not allowed, as against prior purchasers of the property in question for a valuable consideration in good faith, and without notice express or implied, of the facts sought to be introduced into the record: *Gibson v. Bailey*, 9 N. H. 168; *Whittier v. Varney*, 10 Id. 291; *Bean v. Thompson*, 19 Id. 294; 49 Am. Dec. 154; *Cass v. Bellows*, 31 N. H. 511; 64 Am. Dec. 347; *Avery v. Bowman*, 39 N. H. 393; *Derry Bank v. Webster*, 44 Id. 264; *Jaquith v. Putney*, 48 Id. 138; *Williams v. Brackett*, 8 Mass. 240; *Emerson v. Upton*, 9 Pick. 167; *Johnson v. Day*, 17 Id. 106; *Hovey v. Wait*, 17 Id. 196; *Freeman v. Paul*, 3 Me. 260; 14 Am. Dec. 237; *Means v. Osgood*, 7 Me. 146. And, generally, amendments are not allowed to affect the vested rights of third parties, or where injustice will be done to any one: *Chamberlain v. Crane*, 4 N. H. 115; *Goodwin v. Smith*, 4 Id. 29; *Bowman v. Stark*, 6 Id. 459; *Smith v. Moore*, 17 Id. 384; *Wendell v. Mugridge*, 19 Id. 109; *Baker v. Davis*, 22 Id. 27. No reason has been assigned, and none is perceived, for exempting towns from the operation of the general rule. These considerations afford a sufficient answer (if there were no other) to the suggestion that "no decision has been produced which goes to the extent of holding the town estopped from having the record put right merely because it has been trusted to and acted upon." *New Haven etc. R. R. Co. v. Chatham*, 42 Conn. 465, was an application for a *mandamus* to compel the defendant town to guarantee certain bonds issued by the plaintiffs. In 1871, the legislature authorized the town to guarantee the bonds, "provided, however, that at any town-meeting called for acting under the provisions of this resolution, the vote upon the question of guaranteeing said bonds of said railroad company shall be taken by ballot." At a meeting called for the purpose, October 14, 1871, a resolution inserted in the warning, directing the selectmen to guarantee the bonds on certain conditions, was adopted. The vote was not taken by ballot, and was recorded as follows: "Voted, that the resolution prescribed in the warning be adopted. Yes, 178. No, 86." The plaintiffs, in good faith, relying upon the recorded vote, and without notice that it was not taken by ballot, made contracts for building their road, issued the bonds, and delivered them, together with an order on the defendants for the guaranty, to the contractors, who in like good faith received them, performed work, furnished ma-

terials, and expended money in reliance upon the promised guaranty. In November, 1874, after the plaintiffs had fully performed the conditions stated in the resolution, and the defendants' selectmen had refused to execute the guaranty, this application was filed. The superior court, at the April term, 1875, upon the petition of an inhabitant of the town, ordered the record of the vote to be amended by making to it this addition: "Said vote was taken by a division of the house and a count, and not by ballot." The defendants were held estopped from claiming that the vote was not taken by ballot, or from availing themselves of the amendment ordered by the superior court, and a peremptory *mandamus* was granted: See also *Moore v. Mayor etc. of New York*, 73 N. Y. 238; 29 Am. Rep. 134.

The building and completion of the railroad upon the faith of the recorded vote, and according to its provisions, constituted a contract executed on the part of the defendants, as where a reward is offered upon certain conditions, and an individual relying upon the offer performs the conditions: *Janerin v. Exeter*, 48 N. H. 83; 2 Am. Rep. 185. It is as if the defendants and the town had executed a written agreement,—the defendants to build the railroad in the time and manner expressed by the vote, and the town in consideration thereof to pay the sum stated,—and the defendants had performed their part of the contract. In an action brought by them to recover the money, parol evidence could not be received to show that a stipulated condition was omitted by mistake of one party, or even of both, or in any way to contradict or modify the terms of the agreement. If the writing did not express the actual contract, the only remedy would be by bill in equity to reform it.

In *Chamberlain v. Dover*, 18 Me. 466, 29 Am. Dec. 517, and *Turnpike v. Pomfret*, 20 Conn. 590, the only cases cited as holding that an amendment may be properly allowed in such a case as this, it does not distinctly appear that the plaintiffs acted upon the faith of the original record, or that they did not know the facts to be as stated in the amendment. The amendment was made by the clerk of his own motion. The court held that, acting at his peril, he might properly do so; that the amended record must be taken to be the true one, and conclusive of the facts, until, if false, corrected in proceedings instituted for the purpose. It has never been held in this state that the clerk may amend the record, except under the direction of the court, and upon a showing that justice requires

it: *Gibson v. Bailey*, 9 N. H. 176; *Low v. Pettengill*, 12 Id. 337; *Cass v. Bellows*, 31 Id. 501; 64 Am. Dec. 347; *Pierce v. Richardson*, 37 N. H. 311.

The position that the vote as recorded could not be taken under the article in the warrant; that the town could only vote to dismiss it, or to give a greater or a less per cent of its valuation upon the precise conditions and limitations expressed in the article,—cannot be sustained. The statute requires that “the subject-matter of all business to be acted upon shall be distinctly stated in the warrant”: Gen. Laws, c. 38, sec. 2. The purpose of the requirement is to inform the inhabitants of the business upon which they are called to act in the meeting,—“to bring before the town substantially and intelligently the subject with which it has to deal”: *Tucker v. Aiken*, 7 N. H. 113, 125, 126; *Pittsburg v. Danforth*, 56 Id. 272; *Matthews v. Westborough*, 131 Mass. 523. Here the matter to be acted upon was the question of aiding the defendant to build its railroad: Gen. Stats., c. 34, sec. 16. The town might grant its aid upon such terms as it saw fit. If the limitations expressed in the article had been omitted, all or any part of them might have been incorporated in the vote. Their insertion did not preclude the town from rejecting them, or from granting aid upon other and different conditions. A vote to build a town hall thirty feet by fifty, under an article to see if the town will build one forty feet by sixty, might as well be held unwarranted: *Converse v. Porter*, 45 N. H. 395; *Child v. Colburn*, 54 Id. 71; *Pittsburg v. Danforth*, *supra*; *Haven v. Lowell*, 5 Met. 35; *Hadsell v. Hancock*, 3 Gray, 526; *Sherman v. Torrey*, 99 Mass. 472; *Reed v. Acton*, 117 Id. 384, 390; *Wood v. Jewell*, 130 Id. 270; *Bartlett v. Kinsley*, 15 Conn. 332.

It is urged that the language of the article in connection with that of the vote was of itself sufficient to put the defendants upon inquiry, and that they are therefore chargeable with notice of the error in the record. It is not perceived how anything contained in the article could naturally or legitimately tend to show, or lead to a suspicion, that the record of a vote which could lawfully and properly be taken under it was erroneous; how the absence in the record of a clause in the article, which for good reasons might properly be rejected, is calculated to lead to the inference that it was erroneously omitted. The recorded vote provided for the gratuity in case the road should be completed in a reasonable time, which might be longer or shorter than the time mentioned in the

article. It was the same in legal effect as if the words "to be completed in a reasonable time" had been added to the record. For adopting this limitation rather than that specified in the article, or any other fixed and definite time, the town might have satisfactory reasons. It was not so extraordinary, unreasonable, or unnatural action as upon its face to excite suspicion that it could not have been taken.

It is suggested that the granting of the amendment rested in the discretion of the presiding justice who allowed it, and that the question of discretion is not reserved, and cannot be revised. Whether upon the facts stated the amendment can be allowed, is a question of law; if it can, whether justice requires that it should be, is a question of fact to be determined at the trial term. The first question only has been considered.

Motion for rehearing denied.

CONCLUSIVENESS OF THE RECORDS OF TOWN-MEETINGS AND OTHER CORPORATION OR CORPORATIONS, AND THE POWER TO AMEND THE SAME. — It has been long and well settled that the records of public or municipal corporations are properly admissible in evidence generally to prove facts stated in them. And among the records so admissible are the books of record of the transactions of towns, city councils, and other municipal bodies: *Rex v. Mothersall*, 1 Strange, 93; *Denning v. Roome*, 6 Wend. 651; *Weith v. City of Wilmington*, 68 N. C. 24; *Greenfield v. Camden*, 74 Me. 56. And the doctrine that where there is a record it cannot be added to or varied by parol, but the record will be deemed to be evidence of all that was done, and that nothing more was done, is well sustained by authority: *Hutchinson v. Pratt*, 11 Vt. 402; *Moor v. Newfield*, 4 Me. 44; *Gilbert v. New Haven*, 40 Conn. 102. The rule is, if the law requires the evidence of a transaction to be in writing, oral evidence cannot be substituted for that, so long as the writing exists and can be produced, and this rule applies as well to the transactions of municipal bodies as to those of individuals: *People v. Zeyet*, 23 N. Y. 140; *Pierce v. Wright*, 45 How. Pr. 1; *People v. Mitchell*, 45 Barb. 208; *Owings v. Speed*, 5 Wheat. 420; *Gaither v. Tax Collector*, 40 La. Ann. 362. It is accordingly held that the record of the proceedings of a town meeting is conclusive in relation to all business there transacted, and cannot be varied or controlled by parol evidence: *People v. Zeyet*, 23 N. Y. 140; and this general rule applies also to the records of parishes, school districts, and similar organizations: *Halleck v. Boylston*, 117 Mass. 469; *Andrews v. Boylston*, 110 Id. 214; *Morrison v. City of Lawrence*, 98 Id. 219. Thus where the records of a school district show that the district voted to authorize their clerk to call and warn "their annual meetings," it is not competent to prove by parol evidence that the real vote of the district was to authorize the clerk to call and warn "all" district meetings: *Third School District v. Atherton*, 12 Met. 106; and to the same effect, see *Eddy v. Wilson*, 43 Vt. 362; *Cameron v. School District*, 42 Id. 507. So in Louisiana, the proceedings of police juries must be kept in writing, and the minutes of their proceedings make up a public record imparting absolute verity, and they cannot be attacked or contradicted in a collateral action to which the board are not made parties: *State v. Sim-*

mons, 40 La. Ann. 758; and the same is true of the official minutes of the board of levee commissioners: *Gaither v. Tax Collector*, 40 La. Ann. 362; and the general rule is asserted, that parol evidence in a collateral action cannot be received to contradict the records of a public corporation which are required by law to be kept in writing, or to show a mistake in the matters therein recorded: *Id.*; and see *Lexington v. Headley*, 5 Bush, 508; *Gilbert v. New Haven*, 40 Conn. 102; *Cabot v. Britt*, 36 Vt. 349. And it is held that the records of one county cannot be impeached collaterally by the introduction of the records of another county: *Bradbury v. Benton*, 69 Me. 194.

But while the proceedings of municipal bodies, which are required to be recorded, must, as a general rule, be proved by the record, yet a distinction is sometimes made between evidence to contradict facts stated in the record, and evidence to show facts omitted from the record. And in the latter class of cases parol evidence has been held admissible, unless the statute expressly and imperatively requires the same to appear of record, and makes the record the only evidence thereof: See *United States Bank v. Dandridge*, 12 Wheat. 69, 74; *United States v. Fillebrown*, 7 Pet. 28; *Langedale v. Boynton*, 12 Ind. 467. In one case the court sustained the admission of parol testimony as a means of establishing in part the passage of an ordinance. It was decided that where a city fails to provide any book for the record of its ordinances, but its ordinances, after their passage and approval, are placed and kept on file in the office of the city clerk, and a third party obtains a duly certified copy of an ordinance so placed and kept on file, and acts in good faith upon such ordinance, and is induced partly thereby to make large expenditure of money, in a subsequent controversy between the city and such third parties or their assigns, the rule of equitable estoppel will apply to the city, and the due passage and existence of said ordinance may be shown by parol testimony: *City of Troy v. Atchison etc. R. R. Co.*, 11 Kan. 519; 13 Id. 70; and see *Hutchinson v. Pratt*, 11 Vt. 402. So where the records of a municipal corporation were kept in an imperfect manner, and there was no written evidence in existence to show the adoption by the city council of a resolution authorizing certain work to be done, it was held that parol evidence was admissible to prove the passage of such resolution: *Ross v. City of Madison*, 1 Ind. 281; and see *O'Mally v. McGinn*, 53 Wis. 353; *Darlington v. Commonwealth*, 41 Pa. St. 68. In Ohio, the records of municipal corporations are not regarded to be of that absolute verity that any person shall be estopped to show the truth in consequence of any matter which they contain: *Westervan v. Clive*, 5 Ohio, 136; *Reynolds v. Schweinfus*, 27 Ohio St. 312. And in the absence of any statutory provision to the effect that the proceedings of a municipal body can only be proved by written evidence, such proceedings may be proved by parol evidence: *White v. State*, 69 Ind. 273.

It is held that the books of account of a municipal corporation, kept by the proper officer, are *prima facie* evidence of the facts therein stated, and are competent to charge the corporation. Entries in such books are not, however, conclusive, but are subject to parol explanation: *St. Louis Gas Light Co. v. St. Louis*, 11 Mo. App. 55; 84 Mo. 202; and it has been held that such entries are not competent evidence on behalf of the corporation: *Fraser v. Charleston*, 8 S. C. 318.

The records or minutes of the doings of private corporations, when regularly kept by the proper officer, or by some other person in his necessary absence, are evidence, though not conclusive, of the corporate proceedings, and of all that may fairly be intended from them: *Woonsocket etc. R. R. Co. v. Sherman*, 8 R. I. 564; and see *Highland Turnpike Co. v. McKean*, 10 Johns.

154; 6 Am. Dec. 324; *Stebbins v. Merritt*, 10 Cush. 27; *Lewis v. Glenn*, 84 Va. 947; *Brewer v. Stone*, 11 Gray, 228; *Schell v. Second Nat. Bank*, 14 Minn. 43. When the corporation has been regularly organized, and the proceedings entered of record, the records are then competent and sufficient evidence of who are the corporators, and of the number of shares held by each, unless proof be introduced to destroy the effect of the records: *Penobscot etc. R. R. Co. v. White*, 41 Me. 512; 66 Am. Dec. 257; *Lehman v. Glenn*, 87 Ala. 618; *Hammond v. Straus*, 53 Md. 1, 16; *Pittsburgh etc. R. R. Co. v. Applegate*, 21 W. Va. 172; *Glenn v. Orr*, 96 N. C. 415; *Vanderwerker v. Glenn*, Sup. Ct. Va., 1888; *Turnbull v. Payson*, 95 U. S. 418. And records of a corporation, showing the election at the annual meeting of a certain person as a director, and his presence and making motions at a subsequent meeting of the directors, are *prima facie*, but not conclusive, evidence against him that he accepted the office: *Blake v. Bayley*, 16 Gray, 531. So the books of a bank are competent evidence, both for and against the corporation, but it is competent to prove by parol independent facts, such as the division and distribution of stock, and the issuing of bills or notes: *Bank v. Darden*, 18 Ga. 318. And, generally speaking, the books of a corporation may be offered in evidence, either for or against the corporation, where the acts recorded are of a public nature, and when the entries have been made by a proper officer: See *Whitman v. Granite Church*, 24 Me. 236; *Highland Turnpike Co. v. McKean*, 10 Johns. 154; 6 Am. Dec. 324; *Jermain v. Worth*, 6 N. Y. 276; *Duke v. Cahawba Nav. Co.*, 10 Ala. 82; 44 Am. Dec. 472; but when they relate to the private business transactions of the corporation, they are, as a general rule, inadmissible, except perhaps in controversies between the members: *Hager v. Cleveland*, 36 Md. 476; *Commonwealth v. Woolper*, 3 Serg. & R. 29; 8 Am. Dec. 628; as to such transactions, they are not evidence as between the corporation and a member or a stranger, and, *a fortiori*, they cannot be so between a member and a stranger, or between two strangers: *Haynes v. Brown*, 36 N. H. 545; *Welch v. City of Wilmington*, 68 N. C. 24, 27.

In New England, a clerk of a town or other similar organization, while in office, has the power to amend his record to conform to the truth: *Chamberlain v. Dover*, 13 Me. 466; 29 Am. Dec. 517; *Wells v. Battelle*, 11 Mass. 477; *Cass v. Bellows*, 31 N. H. 501; 64 Am. Dec. 347; *Mott v. Reynolds*, 27 Vt. 206; *Boston Turp. Co. v. Pomfret*, 20 Conn. 590; and see *President etc. v. O'Malley*, 18 Ill. 407. This is upon the ground that he is a public officer, appointed to keep the records, and sworn to perform this duty, has the custody of the records, is presumed to know the fact in relation to which the amendment is made, and if he states what is not true, he may be punished for fraudulent conduct in his office: *Halleck v. Inhabitants of Boylston*, 117 Mass. 469. And when an amendment is thus made, it becomes a part of the record, and no different rule of evidence can be applied to the record as amended, or any portion of it, than can be applied to the original record before or after the amendment. The same reasons which render the one conclusive apply equally to the other, and parol evidence cannot be admitted to control the record as amended: *Id.*; *Commonwealth v. McGarry*, 135 Mass. 553; *Boston Turp. Co. v. Pomfret*, 20 Conn. 596. And it has been held that although amendments in the proceedings of town officers must be made by the persons in office when the proceedings were had, yet it is not necessary that they should be in office at the time of making the amendments: *Gibson v. Bailey*, 9 N. H. 168, followed in *Kiley v. Cranor*, 51 Mo. 541. But the weight of authority is to the effect that the power of a town officer to amend his records

is allowed to him only while he is in office: *Boston Turnp. Co. v. Pomfret*, 20 Conn. 590; *School District v. Atherton*, 12 Met. 105. Nor can changes and amendments of the record be made at a remote period by an entirely new and different board. Thus an ordinance was reported to the city council at a meeting of the board in August, 1854, and no further action thereon was had. An entirely new board, who came into office in 1856, by an order, caused the words "passed unanimous" to be added to the record, and it was held that the amendment was unauthorized, and that it was not competent to prove by extrinsic evidence that the ordinance had passed: *City of Covington v. Ludlow*, 1 Met. (Ky.) 295. In New Hampshire, amendments of town records may be allowed, by the superior courts, according to the truth, but the facts must be clearly shown. The court must be satisfied, by the testimony of witnesses in writing, that the amendments can be made consistently with the truth, and the order of court sets out in terms the precise amendment to be made. Nor does the court permit any erasures or interlineations of the original record, but requires the amendment to be written on a separate paper, signed by the proper officer, and with it a copy of the order allowing the amendment, and this paper is then annexed to the original record: *Pierce v. Richardson*, 37 N. H. 306, 311. But such strictness in practice is not usually required, and where the record of the appointment of a village marshal was read and approved by the board of trustees, as being in accordance with the facts, and the validity of the appointment was questioned because the record was interlined, it was held that the interlineation was immaterial: *Brophy v. Hyatt*, 10 Col. 223.

The law does not require the selectmen of New England towns to keep records of their proceedings, and does not provide for the appointment of a clerk, who shall be sworn as such. And where one of the selectmen, by appointment of his associates, keeps the minutes of their proceedings, he does not keep a record required by law, and does not act under the sanction of an oath of office as clerk, and he has not the power to make amendments of the minutes which will give them the character of records constituting independent and conclusive evidence: *Commonwealth v. McGarry*, 135 Mass. 553.

It is competent for a public corporation, as it is for every court of record, to amend its records *sua sponte*, if there be matter of record authorizing the amendment: *Commissioners etc. v. Hearne*, 59 Ala. 371; as where the city clerk has failed to keep the record of the yeas and nays upon the adoption of a resolution by the common council, a *sua sponte* entry of the omitted proceedings may be caused to be made by the common council: *City of Logansport v. Crockett*, 64 Ind. 319.

It is deemed of so great importance to uphold the proceedings of public corporations that the courts are disposed to be as indulgent in allowing entries of their proceedings to be amended as is consistent with the safety of those whose interests would be affected by them; and the power of clerks of towns and other municipal corporations to amend their records while they continue in office is well established by authority. But the law further provides an effectual remedy for any errors in their records, whether arising from design, mistake, or accident, by the writ of *mandamus*, by means of which these errors may be corrected, on the application of any person interested: See *Samie v. King*, 40 Conn. 298; *Farrell v. King*, 41 Id. 448; *People v. Brinkerhoff*, 68 N. Y. 259. By amending the record himself, however, the officer only does what the court would direct him to do, on the ground that his duty required it; and an application for a *mandamus* in such cases is,

therefore, generally unnecessary: See *Boston Turnp. Co. v. Pomfret*, 20 Conn. 590. But the general rule is, that amendments of records are to be made with the saving of the rights of third persons, acquired since the existence of the defect: *Cass v. Bellows*, 31 N. H. 501; 64 Am. Dec. 347.

Where the record of the proceedings of a board of municipal officers is under the exclusive control of the board, a writ of *mandamus* directed to the clerk to compel him to correct the record would be unavailing. In such case, the correction must be made under some proceeding had by the board itself: *Wood v. Orford*, 52 Cal. 412.

CAVIS v. BECKFORD.

[62 NEW HAMPSHIRE, 229.]

FIXTURES. — AS BETWEEN VENDOR AND VENDEE OF A MILL, a steam-boiler and looms used in the mill as necessary parts of the machinery thereof may constitute fixtures of the mill and a part of it, though held in position merely by their own weight.

TROVER for a steam-boiler and its fixtures, and two looms. In February, 1870, the defendant, being owner of a woollen-mill and the machinery therein, conveyed the mill, by a warranty deed describing the land on which the mill stood, to Williams Brothers for a valuable consideration, and the latter, on the same day, reconveyed it to the defendant by warranty mortgage deed to secure the purchase-money, and they took possession in the following April or May. At the time of the sale, the mill was warmed by stoves, and the heat for scouring and coloring purposes was obtained from a copper boiler in the dye-house outside the mill. After taking possession, the purchasers sold the stoves and copper boiler, and procured and substituted in their stead the steam-boiler in controversy, which was connected with pipes, and was used both for warming the mill and for scouring and coloring, and this was the only arrangement for those purposes while the mill was in their possession. The boiler was placed in the mill by cutting a hole in the floor of about the size of the boiler, and for the front end building a support of brick from the ground, above the floor level, and bricking about the fire-box, the rear end of the boiler being placed in an iron rest upon a split-stone base fixed in the ground. The remaining space beneath the boiler was filled with earth to the floor level. In the following June, the two looms in controversy were bought and placed in the mill by the Williams Brothers in lieu of some small frocking-looms, which were removed from the mill, with the consent of the defendant, to a store-house on the premises. In placing

the former in the mill, timbers of about twelve by four inches were laid on the floor of the mill, and the looms were placed on the timbers. They weighed about fifteen hundred pounds each, and were attached to the floor by their own weight alone, no fastening connecting the timbers with the floor or the looms with the timbers. They were connected by belting with the main shaft in the mill, became a part of the machinery of the mill, as did also the steam-boiler in controversy, and all three were necessary for the purposes of the mill as used during the occupancy of the Williams Brothers. In January, 1871, the latter, to secure an indebtedness to the plaintiff, gave him a chattel mortgage, duly recorded, of the property in controversy. In March, 1871, the Williams Brothers, having failed to pay the purchase-money, and having become further indebted to the defendant, they conveyed the mill property to him by a quitclaim deed describing the property substantially as in the deed of purchase; and it was the understanding between the parties that the defendant should collect nothing upon his mortgage note other than the property reconveyed, and that the mortgage and note should exist so far as to protect the quitclaim deed against intervening claims, but was ultimately to be delivered to the makers; and in pursuance of this understanding, the note was delivered to them some three or four years before the time of the hearing. On receipt of the quitclaim deed, the defendant took possession of the mill, including the property in controversy, and he or parties holding under him have since been in possession.

Fling and Chase, for the plaintiff.

Barnard and Barnard, for the defendant.

DOX, C. J. As between the mortgagor and mortgagee of the mill, the boiler and looms were fixtures: *Mather v. Fraser*, 2 Kay & J. 536; *Walmsley v. Milne*, 7 Com. B., N. S., 115, 132; *Climie v. Wood*, L. R. 3 Ex. 257; *Winslow v. Insurance Co.*, 4 Met. 306; 38 Am. Dec. 368; *Richardson v. Copeland*, 6 Gray, 536; 66 Am. Dec. 424; *McConnell v. Blood*, 123 Mass. 47; 25 Am. Rep. 12; *Southbridge Bank v. Exeter Works*, 127 Mass. 542; *Voorhees v. McGinnis*, 48 N. Y. 278, 286; *Tift v. Horton*, 53 Id. 380; 13 Am. Rep. 537; *Quinby v. Manhattan Co.*, 24 N. J. Eq. 260; *Merritt v. Judd*, 14 Cal. 59; *Frankland v. Moulton*, 5 Wis. 1; *Parsons v. Copeland*, 38 Me. 537; *Symonds v. Harris*, 51 Id. 14; 81 Am. Dec. 553; *Lapham v. Norton*, 71 Me.

83, 85; *Walker v. Sherman*, 20 Wend. 636; *Payne v. Bank*, 29 Conn. 415; *Harlan v. Harlan*, 15 Pa. St. 507; 53 Am. Dec. 612; *Green v. Phillips*, 26 Gratt. 752; 21 Am. Rep. 323; *Latham v. Blakely*, 70 N. C. 368; *Deal v. Palmer*, 72 Id. 582; *Boyd v. Shorrocks*, L. R. 5 Eq. 72; *Longbottom v. Berry*, L. R. 5 Q. B. 123; *Despatch Line v. Bellamy Mfg. Co.*, 12 N. H. 205, 232; 37 Am. Dec. 203; *Baker v. Davis*, 19 N. H. 325, 334; *Lathrop v. Blake*, 23 Id. 46, 64; *Tuttle v. Robinson*, 33 Id. 104, 119; *Wadleigh v. Janerin*, 41 Id. 503; 77 Am. Dec. 780; *Burnside v. Twitchell*, 43 N. H. 390, 393; *Cochran v. Flint*, 57 Id. 514; *Kent v. Brown*, 59 Id. 236.

Judgment for the defendant.

FIXTURES — WHAT ARE FIXTURES GENERALLY: See *Larson v. Standard Soap Co.*, 80 Cal. 245; *ante*, p. 147, and particularly note 153 et seq.

MOORE v. PHOENIX INSURANCE COMPANY.

[62 NEW HAMPSHIRE, 262.]

INSURANCE — FIRE — POLICY RENDERED VOID BY NON-OCCUPATION OF INSURED PREMISES IS NOT REVIVED BY SUBSEQUENT REOCCUPATION. — A policy of fire insurance which has become void by reason of the violation of a condition therein, that the insured premises should not be unoccupied for a period of more than ten days without the consent of the insurer indorsed on the policy, is not revived when occupation of the premises is subsequently resumed.

CONTRACTS. — IN CONSTRUING CONTRACTS, WORDS ARE TO BE UNDERSTOOD in their ordinary and popular sense, except in those cases in which the words used have acquired by usage a peculiar sense different from the ordinary and popular one.

ASSUMPSIT on a policy of insurance. The material facts appear in the opinion. The plaintiff had a verdict, which the defendant moved to set aside. The motion was denied, and the defendant excepted.

Philip Carpenter, Bingham and Aldrich, and Bingham, Mitchells, and Batchellor, for the defendants.

Ray, Drew, and Jordan, Rand and Morse, and J. L. Foster, for the plaintiffs.

SMITH, J. The defendants are liable only in accordance with the terms and stipulations expressed in their contract as the conditions of their liability. The contract is in writing, and is contained in the policy of insurance. In consideration

of \$8.50 paid by the plaintiff, the defendants covenanted to insure his property against loss or damage by fire for the term of three years, commencing August 15, 1876. The policy contained this condition: "If the above-mentioned premises shall be occupied or used so as to increase the risk, or become vacant and unoccupied for a period of more than ten days, or the risk be increased by any means whatever within the control of the assured, without the assent of this company indorsed hereon, . . . then, and in every such case, this policy shall be void." The premises remained unoccupied from August 24 until December 11, 1876, and on the 18th or 19th of that month were destroyed by fire. The contract was, not that the policy should be void in case of loss or damage by fire during the period of unoccupancy, but that vacancy and unoccupancy should terminate the policy. There is no occasion to inquire what distinction there may be between a vacant and an unoccupied building (*Herrman v. Merchants' Ins. Co.*, 81 N. Y. 184; 37 Am. Rep. 488; *Herrman v. Adriatic Ins. Co.*, 85 N. Y. 162; 39 Am. Rep. 644; *North America Fire Ins. Co. v. Zaenger*, 63 Ill. 464; *American Ins. Co. v. Padfield*, 78 Id. 167), for no point was made at the trial that the plaintiff's buildings were not both vacant and unoccupied from August 24th until December 11th. Nor is it necessary to go into an inquiry of the reasons for exacting this condition. It is enough that the parties entered into the covenant. It was a condition that would afford protection of a substantial character against fraudulent incendiarism, of which insurers may well avail themselves: *Hill v. Equitable Ins. Co.*, 58 N. H. 82; *Sleeper v. N. H. Ins. Co.*, 56 Id. 406. The insurers had a right, by the terms of the policy, to the care and supervision which are involved in the occupancy of the buildings: *Ashworth v. Builders' M. F. Ins. Co.*, 112 Mass. 422; 17 Am. Rep. 117.

There was no waiver by the defendants of the condition, nor any assent to the changed condition of the premises insured, for they had no notice or knowledge that the buildings were unoccupied until the plaintiff furnished his proofs of loss. A waiver, to be effectual, must be intentional. The premises were left unoccupied more than ten days; and if the non-occupation had continued to the time of the fire, the plaintiff could not recover: *Fabian v. Union M. F. Ins. Co.*, 33 N. H. 206; *Shepherd v. Union M. F. Ins. Co.*, 38 Id. 240; *Sleeper v. N. H. Ins. Co.*, 56 Id. 406; *Hill v. Equitable Ins. Co.*, 58 Id. 82; *Baldwin v. Phoenix Ins. Co.*, 60 Id. 164; *Lyman v. State*

Mut. Ins. Co., 14 Allen, 329; *Merriam v. Middlesex M. F. Ins. Co.*, 21 Pick. 162; 32 Am. Dec. 252; *Herrman v. Adriatic Ins. Co.*, 85 N. Y. 162; 39 Am. Rep. 644; *Harrison v. City Fire Ins. Co.*, 9 Allen, 231; 85 Am. Dec. 751; *Wustum v. City F. Ins. Co.*, 15 Wis. 138; *Mead v. Northwestern Ins. Co.*, 7 N. Y. 530.

It is contended by the plaintiff, upon the authority of *State v. Richmond*, 26 N. H. 232, that the policy had not become absolutely void at the expiration of ten days from the time the house became unoccupied, but was voidable only at the election of the defendants. In the construction of contracts, words are to be understood in their ordinary and popular sense, except in those cases in which the words used have acquired by usage a peculiar sense different from the ordinary and popular one. In this case, the word "void" has not acquired by usage a different signification from the ordinary and popular one of a contract that has come to have no legal or binding force. Whether the cessation of the executory contract of insurance was temporary and conditional, or perpetual and absolute, is a question; but "void" means that on the eleventh day of continuous non-occupation the plaintiff was not insured. The defendants might have waived the condition altogether, or might have waived its breach; but having had no opportunity before the loss to make their election to waive the breach, their refusal to pay, when notified of the loss and unoccupancy, was an effectual election that they insisted upon the condition in the policy.

The duty of obtaining the consent of the defendants to the changed condition of the buildings rested with the plaintiff. By his neglect to comply with this requirement of the contract, it came to an end by force of its own terms: *Girard Ins. Co. v. Hebard*, 95 Pa. St. 45. If, when the unoccupancy commenced, he had requested the assent of the defendants, they would have had their option to continue the policy upon payment of such additional premium as the increased risk called for, or to cancel the policy, refunding the unearned premium: *Lyman v. State Mut. Ins. Co.*, 14 Allen, 329. There is no presumption that they would have given their assent to the unoccupancy of the buildings without the payment of a premium commensurate with the additional hazard.

The contract being once terminated, it could not be revived without the consent of both of the contracting parties. It is immaterial, then, whether the loss of the buildings is due to

unoccupancy or to some other cause: *Mead v. North Western Ins. Co.*, 7 N. Y. 530, 535, 536; *Lyman v. State Mut. Ins. Co.*, 14 Allen, 329, 335; *Merriam v. Middlesex M. F. Ins. Co.*, 21 Pick. 162; 32 Am. Dec. 252; *Jennings v. Chenango Co. Ins. Co.*, 2 Denio, 81; *Shepherd v. Union M. F. Ins. Co.*, 38 N. H. 232, 239, 240; *Poor v. Humboldt Ins. Co.*, 125 Mass. 274; 28 Am. Rep. 228; *Alexander v. Germania F. Ins. Co.*, 66 N. Y. 464, 468; 23 Am. Rep. 76; *Sleeper v. New Hampshire Ins. Co.*, 56 N. H. 401; *Hill v. Equitable Ins. Co.*, 58 Id. 82.

In *Mead v. North Western Ins. Co.*, 7 N. Y. 530, it is said: "The only safe rule is to hold the contract of insurance at an end the moment the warranty is broken, and that it cannot be revived again without the consent of both parties, unless the insurer has by some act or line of conduct waived the breach or violation of the warranty." If, as the report of that case seems to show, camphene was used for light in the building insured (in violation of a condition in the policy), and was removed from the building after the fire had commenced, but before it reached the building, the case is not of much value upon the question now under consideration.

In *Fabyan v. Union M. F. Ins. Co.*, 33 N. H. 203, it was provided in the policy that if the insured should procure further insurance on the property without the consent of the company indorsed on the policy, the company should be discharged from liability. The insured procured further insurance without notice to the company, which expired before the loss by fire, and it was held that the insurer was discharged: See also *Glen v. Lewis*, 8 Ex. 607.

This result is in accordance also with that rule of the law of marine insurance which holds that a deviation from the stated voyage against a condition in the policy discharges the insurer, though the loss does not happen during the deviation, nor the risk be increased thereby: *Kettell v. Wiggin*, 13 Mass. 68; *Burgess v. Equitable Ins. Co.*, 126 Id. 70; 30 Am. Rep. 654; *Fernandez v. Great Western Ins. Co.*, 48 N. Y. 571; 8 Am. Rep. 571; *Maryland Ins. Co. v. Le Roy*, 7 Cranch, 26. Kent says: "The courts are exceedingly strict in requiring a prompt and steady adherence to the performance of the precise voyage insured; and considering the particular state of facts upon which calculations of the value of risks are made, and the uncertainty and danger of abuse that relaxations of the doctrine would introduce, the severity of the rule is founded in sound policy": 3 Kent's Com. 314.

Worthington v. Bearse, 12 Allen, 382, 90 Am. Dec. 152, is not in conflict with the authorities that alienation of title avoids the policy. In that case, the mortgagor (plaintiff) of a vessel insured his interest (seven eighths) for one year, payable to the mortgagee. The mortgagor then sold thirteen sixteenths of the vessel to L., who agreed to pay the plaintiff's debt to the mortgagee, but failing to do it, reconveyed the thirteen sixteenths to the plaintiff during the year. It was held that the contract of sale was never executed, but that if it had been the plaintiff's right to recover was only suspended during the time the title to the vessel was vested in the vendee, there being no stipulation in the policy that the insured should not convey or assign his interest in the vessel during the year.

Landers v. Watertown Ins. Co., 86 N. Y. 414, 40 Am. Rep. 554, cited by the plaintiff, only decides that the defense of prior insurance was not disposed of on the trial, as the prior insurer might not elect to avoid its policy for breach of condition, and if the agent of the defendants knew of the prior insurance, the question of waiver would be material; and so a new trial was ordered.

In *Baldwin v. Phoenix Ins. Co.*, 60 N. H. 164, the policy was held void, although it did not appear that the fire was caused in consequence of the change in title.

The decisions in Maine, cited by the plaintiff, are not in point, for chapter 84, Laws 1861, Maine, provides that "any change in the property insured, its use or occupation, or breach of any of the conditions or terms of the contract by the insured, shall not affect the contract unless the risk was thereby materially increased": May on Insurance, 269; *Cannell v. Phoenix Ins. Co.*, 59 Me. 582.

The cases cited from Illinois seem to have followed the decision in *New England Ins. Co. v. Wetmore*, 32 Ill. 245, where the policy provided for a suspension of liability so long as the premises should be appropriated and occupied in violation of the terms of the policy. And accordingly, in *New England Ins. Co. v. Schettler*, 38 Id. 166, *Schmidt v. Peoria etc. Ins. Co.*, 41 Id. 296, and *North America Ins. Co. v. McDowell*, 50 Id. 120, 99 Am. Dec. 497, it was held that the insurer's liability recommenced when the increased risk terminated.

In *Gans v. St. Paul etc. Ins. Co.*, 43 Wis. 108, 28 Am. Rep. 535, there was a provision in the policy that it should become void if the building insured should become unoccupied without the consent of the defendants. The building was burnt

while unoccupied. It was held that the policy was voidable at the option of the insurer. The agent of the company had knowledge of the unoccupancy, which was held to be constructive notice to the company. The assured furnished proofs of loss, which were not satisfactory to the company, and he was required to furnish fuller proofs, at an expense of five dollars. It was held that the company was estopped to set up unoccupancy as a defense, and could not subject the plaintiff to further expense and delay for proofs without prejudice to its rights to declare the policy void. In the same state, in *Wustum v. City Ins. Co.*, 15 Wis. 138, it was held that the insured could not recover for the loss by fire of buildings while unoccupied, where the policy provided that if the buildings should become unoccupied, immediate notice should be given to the company, and additional premium be paid, or the policy should become void, and no notice of the unoccupancy was given, nor additional premium paid. In *Putnam v. Commonwealth Ins. Co.*, 18 Blatchf. 368, it was held that the policy was suspended while the forbidden use of naphtha was continued.

Lane v. Maine Ins. Co., 12 Me. 44, 28 Am. Dec. 150, and *Power v. Ocean Ins. Co.*, 19 La. 28, 36 Am. Dec. 665, are not wholly in point. In the former case there was a stipulation in the policy that it should be void and should be surrendered to be canceled in case of alienation of the property by sale or otherwise. The insurance was on a store and on the stock of goods in it. The assured, during the existence of the policy, leased the store by parol and sold the stock of goods. Subsequently he took back the store and the remaining goods. It was held that this was not an alienation of the store within the meaning of the policy, and that the policy would attach to any goods the assured might have in the store at any time within the term of the policy. In *Power v. Insurance Co.*, *supra*, the policy was on household furniture and other personal property, and contained a stipulation that in case of any transfer of the interest of the assured without the consent of the insurer, the policy should be void. The property was sold during the continuance of the risk, but was afterwards taken back on account of the non-payment of the price. The plaintiff was held to have been restored to the possession and ownership of the property before the loss, as if no transfer had taken place. The decision also went upon the ground that the undertaking

was to insure the plaintiff, not on the identical goods or effects existing at the time of the insurance, but on those of the same description that might have been in the building named in the policy within the time covered by it.

In *Obermeyer v. Globe Mutual Ins. Co.*, 43 Mo. 573, the policy recited that there was insurance in other companies in the sum of eighteen thousand dollars, and gave permission for further insurance in the sum of two thousand dollars, "to be reported in total when required," and in default of notice the policy to "cease and be of no effect." Afterwards further insurance was obtained in the sum of four thousand dollars. At the time of the loss there was twelve thousand dollars other insurance. The over-insurance was terminated more than two months before the loss. It was held that the policy was only interrupted while the over-insurance continued. In *Morrison v. Tenn. M. & F. Ins. Co.*, 18 Id. 262, 59 Am. Dec. 299, where A effected insurance on property and afterwards sold and conveyed it to B, who reconveyed it to a trustee to secure to A the payment of the purchase-money, it was held that A retained an insurable interest, and after a loss might recover on the policy.

In *Mitchell v. Lycoming Mutual Ins. Co.*, 51 Pa. St. 402, it was held that a breach of a covenant in a policy not to insure beyond two thirds of the estimated value of the property is a forfeiture of the policy; and that when other policies which are alleged to create the over-insurance are void at the time of the loss, they are no obstacle to a recovery on the policy; but if voidable for some breach of condition for which the insurer might avoid them, but which they had waived, the over-insurance exists. See also May on Insurance, ed. 1873, c. 16, 17, and 1 Phillips on Insurance, secs. 784, 975.

The strict and literal meaning of the stipulation that the policy shall be void if the premises remain unoccupied more than ten days is not that the insurance will be suspended merely during non-occupation after the ten days, and will revive when occupation is resumed. In ordinary speech, a void policy is one that does not and will not insure the holder, if the insurer seasonably asserts its invalidity. It might be argued that this clause should be so construed as to accomplish no more than the purpose for which it was inserted; that its sole purpose was to protect the insurer against the risk resulting from non-occupation; and that if this risk was terminated

by reoccupation, the parties intended the insurance should be suspended only during the existence of the cause of a risk which the company did not assume. On the other hand, it might be argued that such an intention would have been manifested by words specially and expressly providing for a suspension and resumption of the insurance, and would not have been left to be inferred from the general agreement that the policy should be void; that a final termination of the insurance at the end of ten days of non-occupation is plainly expressed by the provision that the policy shall then be void; and that the parties would not think it necessary to go further, and provide that the void policy should not become valid on reoccupation.

Without determining the true construction, or what the result would be if there were no authority in this state, we are inclined to follow the decision in *Fabyan v. Insurance Co.*, 83 N. H. 203, although in that case the question of suspension seems not to have been presented by the plaintiff or considered by the court. It was apparently assumed that "void" meant finally extinguished, and not temporarily suspended; and in the present state of the authorities, we are not prepared to hold that the assumption was erroneous.

Verdict set aside.

INSURANCE. — Conditions in a policy of insurance limiting or avoiding liability are construed strictly against the insurer, and liberally in favor of the assured: *Queen Ins. Co. v. Young*, 86 Ala. 424; 11 Am. St. Rep. 51; *Mutual Assurance Society v. Scottish Union etc. Ins. Co.*, 84 Va. 116; 10 Am. St. Rep. 819, and note 826.

WORDS "VACANT AND UNOCCUPIED," USED IN POLICIES OF FIRE INSURANCE. — As to what is the signification of the words "vacant and unoccupied," in policies of insurance, see *Moore v. Phoenix Ins. Co.*, 64 N. H. 140; 10 Am. St. Rep. 384, and extended note 390-396; *Royal Ins. Co. v. Lubelsky*, 86 Ala. 530; *Stensgaard v. National Fire Ins. Co.*, 36 Minn. 181; *Imperial Fire Ins. Co. v. Kiernan*, 83 Ky. 468; *American Fire Ins. Co. v. Brighton Cotton Mfg. Co.*, 125 Ill. 181.

INSURANCE POLICIES MUST BE CONSTRUED by the same rules as other written instruments; the words must be given a reasonable meaning; where two constructions are possible, the one most favorable to the insured must be adopted; and all doubtful words must be construed against insurer, and in favor of the insured: *United States M. A. Ass'n v. Newman*, 84 Va. 52.

WORDS, IN CONSTRUING A CONTRACT, must generally be given their ordinary and usual meaning: *Pillsbury v. Locke*, 83 N. H. 96; 66 Am. Dec. 711; *Abbot v. Gatch*, 13 Md. 314; 71 Am. Dec. 635; *Workman v. Insurance Co.*, 2 La. 507; 22 Am. Dec. 141; but words must not be taken in their broadest sense when they are equally appropriate in a more limited sense to the object

and nature of the contract: *Hoffman v. Aetna Fire Ins. Co.*, 32 N. Y. 405; 88 Am. Dec. 337, and note. In construing a written contract, every word should be given its appropriate and proper effect: *Chrisman v. State Ins. Co.*, 16 Or. 284; and when there is an uncertainty as to whether words are used in an enlarged or restricted sense, they should be construed most favorably to the contractee: *Paul v. Travelers' Ins. Co.*, 112 N. Y. 472; 8 Am. St. Rep. 758.

LAIRD v. RAILROAD.

[62 NEW HAMPSHIRE, 264.]

PERSONAL PROPERTY — BUILDINGS ON LAND OF ANOTHER. — Buildings placed and standing on the land of another with the right of removal are personal property, and the nature of the property is not changed by the fact that the owner may have such an interest in the land as would enable him to maintain an action of trespass *quare clausum* for an injury to the possession.

PERSONAL PROPERTY — JURISDICTION. — Buildings placed on the land of another with the right of removal, being personal property, an action for damages for injury thereto is transitory, and the plaintiff's right may be enforced in the courts of New Hampshire, though the buildings stood upon the land of another in Vermont.

STATUTES — CONSTRUCTION — LIABILITY OF RAILROAD COMPANIES FOR INJURIES BY FIRE. — Provision of Vermont General Statutes, chapter 28, section 78, that "when any injury is done to a building or other property by fire communicated by a locomotive-engine of any railroad corporation, the said corporation shall be responsible in damages for such injury, unless they shall show that they have used all due caution and diligence, and employed suitable expedients to prevent such injury," enacts a more rigorous rule as to liability than that imposed by the common law, and excludes the defense of contributory negligence in cases arising under the statute. And the Vermont statute, thus construed, determines the liability of a railroad corporation in an action brought in New Hampshire to recover damages for injury to personal property by fire caused by sparks from the defendant's locomotive-engine in Vermont.

ACTION in case for the recovery of damages for the destruction of the plaintiff's buildings and contents by fire, communicated by sparks from the defendant's locomotive-engines. The buildings were situated in Barnet, Vermont, on the line of the defendant's road, and they stood on the defendant's land, in which the plaintiff had a leasehold interest, with the right to remove the buildings. The defendant contended that its liability was determined by the common law, and the court ruled that it was determined by the law of Vermont. The defendant excepted. Evidence offered by the defendant for the purpose of showing contributory negligence on the part of the plaintiff was excluded, and the defendant excepted. Other

facts appear in the opinion. Verdict for the plaintiff, and motion for a new trial.

Ladd and Fletcher, and Ray, Drew, and Jordan, for the defendant.

Philip Carpenter, and Bingham, Mitchells, and Batchellor, for the plaintiff.

CLARK, J. The plaintiff's buildings, standing on the land of the railroad with the right of removal, were personal property: *Aldrich v. Parsons*, 6 N. H. 555; *Dams v. Dame*, 38 Id. 429; 75 Am. Dec. 195; and the nature of the property was not changed by the fact that the plaintiff may have had such an interest in the land as would enable him to maintain an action of trespass *quare clausum* for an injury to the possession. This action is for the recovery of damages for the destruction of the buildings and their contents; and the property destroyed being personal, the action is transitory, and the plaintiff's right, whether common law or statutory, may be enforced in the courts of this state: *Henry v. Sargeant*, 18 N. H. 321; 40 Am. Dec. 146; *Cady v. Sanford*, 58 Vt. 632, 639, 640. "Wherever, by either the common law or the statute law of a state, a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties": Miller, J., in *Dennick v. Railroad Co.*, 103 U. S. 11, 18. As the cause of action arose in Vermont, whatever would be a defense to the action if brought there must be a defense everywhere: Cooley on Torts, 471.

The defendants contended that their liability was fixed by the common law, but the court ruled that it was determined by the law of Vermont, and the defendants excepted; and this presents the principal question in the case. It involves a construction of the Vermont statute relating to the liability of railroad corporations for injuries by fire communicated from locomotive-engines, which is as follows: "Where any injury is done to a building or other property by fire communicated by a locomotive-engine of any railroad corporation, the said corporation shall be responsible in damages for such injury, unless they shall show that they have used all due caution and diligence, and employed suitable expedients to prevent such injury": Gen. Stats. Vt., c. 28, sec. 78. The statute also provides that a railroad corporation shall have an insurable

interest in such property along their route, and may procure insurance thereon in their own name and behalf. If the courts of Vermont had given a construction to this statute, it would be followed, upon the principle, generally if not universally recognized, that the judicial department of every government is the appropriate organ for construing the legislative acts of that government: *Elmendorf v. Taylor*, 10 Wheat. 157, 159. But we have been unable, by our own research or by the aid of counsel, to find any case where the courts of Vermont have been called upon or have undertaken to give a legal construction of the statute upon the question whether it was intended to change the common-law liability of railroad corporations in cases of injury by fire from locomotive-engines, or whether it was designed to affect the remedy merely, by enacting that proof of the fact that the fire was communicated by a locomotive should be *prima facie* evidence of negligence of the company. If the statute changes the common-law liability of the defendants, the ruling of the court was right. If it relates merely to the mode of trial and the remedy, the common-law rule should have governed the trial.

In *Cleavelands v. Grand Trunk R. R. Co.*, 42 Vt. 450, which is the only case in the courts of Vermont under this statute to which our attention has been directed, the question was not raised or considered. The court say: "The plaintiffs claimed, and the evidence tended to prove, that the fire by which their property was destroyed originated by fire communicated by an engine of the defendants. The plaintiffs were not bound to prove anything further in the first instance." The burden then, under General Statutes, chapter 28, section 78, was cast on the defendants, in order to exonerate themselves from liability for the plaintiff's loss, of showing "that they had used all due caution and diligence, and employed suitable expedients to prevent such injury." The question whether the plaintiffs, under the statute, were required to prove negligence of the defendants by a preponderance of evidence upon the whole case, or whether the defendants were required to prove affirmatively, by a preponderance of evidence, that the fire was not caused by their negligence, was not discussed, and the language of the court is consistent with either view. There being no preponderance of evidence either way upon the question of negligence, in the one case the defendants would be entitled to a verdict, and in the other the plaintiffs would be entitled to the verdict. And this is the

point of difference upon this branch of the case. The defendants contend that the reasonable construction of the statute leaves the burden of proof upon the whole case upon the plaintiff, as at common law, to show, by a preponderance of evidence, that the injury was caused by the defendants' negligence. On the other hand, the plaintiff claims that the effect of the statute is to shift the burden of proof, upon the question of negligence, from the plaintiff to the defendants, and to require the defendants to show, by a preponderance of all the evidence in the case, that the injury was not caused by the defendants' negligence; and so the statute has changed the common law, and increased the liability of railroad corporations by imposing upon them the burden of showing affirmatively "that they have used all due caution and diligence, and employed suitable expedients to prevent such injury."

Richardson v. Grand Trunk R'y Co. was an action under this statute, brought in the circuit court of the United States for the district of Vermont. The court charged the jury "that the burden of proof was upon the plaintiffs, in the first instance, to show that the fire in question was communicated from some of the defendant's locomotive-engines to the bridge; and that if the jury were satisfied of that fact, by a fair balance of evidence, then the plaintiffs were entitled to recover, unless the defendant had established, by a fair balance of evidence, that it had used all due caution and diligence, and had employed all suitable expedients to prevent the fire; that the burden of proof was on the defendant as to the latter branch of the case." This was excepted to. On error to the supreme court of the United States, upon this point, the court say: "We see no just ground of complaint of the affirmative instruction given to the jury. It was in accordance with the rule prescribed by the statute; and there seems to have been no controversy in the circuit court respecting the question whether, if the fire was communicated to the bridge by a locomotive, it caused the injury to the plaintiffs": *Grand Trunk R'y Co. v. Richardson*, 91 U. S. 454, 459, 474. So far as this case may be regarded as a precedent upon the construction of the statute, it would seem to be an authority in favor of the plaintiff.

In some jurisdictions the rule is adopted by the courts that the destruction of property by fire from a locomotive raises a presumption of negligence, meaning thereby that proof of the

more stringently in this respect than the common law; and while it was not designed to subject the corporation to civil liability, entirely regardless of the circumstances and occasion of the omission to ring the bell or blow the whistle in all cases of injury by such omission, still it was designed to require, as the general rule, that the bell should be rung or the whistle blown in all cases; and in case of injury by reason of an omission to do so, to impose the burden on the corporation of showing that such omission, in the exercise of a sound judgment by the engineer, in view of the condition of things as they existed at the time, was reasonable and prudent. When, therefore, in a case like the present, the plaintiff would show that the alleged injury was caused by such omission, it would not be necessary to his right of recovery that he should take the burden of showing affirmatively that such omission was unreasonable and imprudent; but it would rest on the defendant, as matter of defense, to show that it was reasonable and prudent."

The reasoning of the court in *Wakefield v. Conn. etc. R. R. Co.*, *supra*, is applicable to the present case. It is a construction by the supreme court of Vermont of sections 55 and 56 of chapter 28 of the General Statutes of Vermont, relating to railroads. We are considering section 78 of the same chapter. Sections 55 and 56 provide, in substance, that railroad corporations shall be responsible in damages for injuries caused by omission to ring the bell or blow the whistle, unless they shall show that such omission was reasonable and prudent under the circumstances of the case. Section 78 provides that railroad corporations shall be responsible in damages for injuries caused by fire, unless they shall show that they have used all due caution and diligence, and employed suitable expedients to prevent such injuries. Upon the point in question, the cases are analogous, and we think that the ruling of the court, at the trial, upon this branch of the case, and the charge to the jury upon the burden of proof, were correct. The charge upon that point was, in substance, the same as was given in *Richardson v. Grand Trunk R'y Co.*, *supra*.

The court ruled that the doctrine of contributory negligence was not applicable to this case. What constitutes contributory negligence, and how far it is a defense in cases of injury by fire from locomotive-engines, has been a subject of discussion in the courts in many jurisdictions, and the decisions are conflicting. Under our New Hampshire statute relating to the

liability of railroad corporations for damages by fire, the question of negligence does not arise: Gen. Laws, c. 162, secs. 8, 9; *Hooksett v. Concord R. R. Co.*, 38 N. H. 242; *Rowell v. Railroad*, 57 Id. 182; 24 Am. Rep. 59; and we have found no case where the question has been considered, or a construction given to the Vermont statute by the courts of Vermont. In the absence of any judicial interpretation of the statute by the courts of that state to guide us, we think the ruling was correct. It seems to be sustained by the rule of construction applied by the supreme court of Vermont in analogous cases. A preceding section of the same chapter (Gen. Stats. Vt., c. 28, sec. 47) makes it the duty of a railroad corporation to erect and maintain a legal fence on the sides of their road, and cattle-guards suitable and sufficient to prevent cattle and animals from getting onto the railroad; and provides that "until such fences and cattle-guards shall be duly made, the corporation and its agents shall be liable for all damages which shall be done by its agents or engines to cattle, horses, or other animals thereon, occasioned by want of such fences or cattle-guards." Under this statute, it is held that the duty of the railroad to erect and maintain fences along their road is absolute, and the question of contributory negligence on the part of the owner of animals injured through the want of such fences does not arise: *Mead v. Burlington etc. R. R. Co.*, 52 Vt. 278. A similar principle of interpretation excludes the defense of contributory negligence in cases of damage by fire. Such, we think, would be the construction of the statute by the Vermont courts, and it is immaterial what our construction would be if it were a New Hampshire statute.

In favor of this construction it may be argued that it is not only in harmony with the Vermont decisions in analogous cases, but it is the natural and reasonable interpretation of the language of the statute, "that the corporation shall be responsible in damages for such injury, unless they shall show that they have used all due caution and diligence, and employed suitable expedients to prevent such injury"; that the statute expressly declares in what cases the corporation shall be relieved from liability, and no other defense is recognized, except showing "that they have used all due caution and diligence, and employed suitable expedients to prevent the injury"; that unless these facts are shown, the liability of the corporation is absolute; and that, by the elementary rule of construction, *Expressio unius est exclusio alterius*, the defense

of contributory negligence is excluded in cases under this statute. The Vermont statute, like ours, gives railroad corporations an insurable interest, in their own name and behalf, in property exposed to danger along their route; and the suggestions of Cushing, C. J., in *Rowell v. Railroad*, 57 N. H. 132, 139, 24 Am. Rep. 59, would seem to be applicable here: "Contributory negligence does not furnish any defense to any action by the insured on the policy of insurance. Negligence, either of the railroad or of the land-owner, would not, according to the authorities, be a defense to an action by the proprietors to recover on their policy the amount of the loss insured. It would be odd enough if the proprietors could recover on their policy, and then turn round and defeat the property owner on the ground of contributory negligence." The jury were instructed that the defendants were not liable for fault, unless such fault occasioned the plaintiff's loss; and that they had the right to act, on the presumption that owners would take reasonable care of their own property. The instructions were correct.

Judgment on the verdict.

RAILROADS—INJURIES OCCASIONED BY FIRE.—Where property has been set on fire, and destroyed by fire which is shown to have escaped from a locomotive-engine, negligence is presumed upon the part of the railroad company, and the burden of proof is upon it to show absence of negligence by proving that the locomotive-engine was properly constructed, and carefully and skillfully managed: *Clemens v. Hannibal etc. R. R. Co.*, 53 Mo. 366; 14 Am. Rep. 460; *Spaulding v. Chicago etc. R. R. Co.*, 30 Wis. 110; 11 Am. Rep. 550; *Atchison etc. R. R. Co. v. Stanford*, 12 Kan. 354; 15 Am. Rep. 362; *Burke v. Louisville etc. R. R. Co.*, 7 Heisk. 451; 19 Am. Rep. 618, and note; *Gulf etc. R'y Co. v. Benson*, 69 Tex. 407; 5 Am. St. Rep. 74, and note 77, 78; *Union Pacific R'y Co. v. De Busk*, 12 Col. 204; *ante*, p. 221, and note 233, 234.

FIXTURES.—The owner of real property can, by express agreement, reimpress the character of personalty upon fixtures which have become such by annexation to his land: Note to *Lavenson v. Standard Soap Co.*, *ante*, p. 153. A building is not a part of the realty, where an agreement makes it the property of one who does not own the real estate upon which it is located: *Hamlin v. Parsons*, 12 Minn. 108; 90 Am. Dec. 284; *Goodman v. Hannibal etc. R. R. Co.*, 45 Mo. 33; 100 Am. Dec. 336, and note 337; *Dame v. Dame*, 38 N. H. 429; 75 Am. Dec. 195; compare *Meig's Appeal*, 62 Pa. St. 28; 1 Am. Rep. 372; *Central Branch R. R. Co. v. Frits*, 20 Kan. 430; 27 Am. Rep. 175; *Waters v. Reuber*, 16 Neb. 99; 49 Am. Rep. 710; *Hinkley etc. Iron Co. v. Black*, 70 Me. 473; 35 Am. Rep. 346, and cases in foot-note.

BUTLER v. LEGRO.

[62 NEW HAMPSHIRE, 350.]

GUARDIAN AND WARD. — **GUARDIAN IS BOUND TO PROTECT THE RIGHTS OF HIS WARDS**, and is not only accountable for their money which he has received, but also for what it was his duty to collect.

GUARDIAN AND WARD — **SETTLEMENT OF ACCOUNT BETWEEN.** — When, on settlement of his account, the guardian does not account for a sum which it was his duty to collect, and did not, and the matter was not brought to the attention of the court, and the question of his liability therefor was not raised and considered in that settlement, the error may be corrected in a further account, ordered, after his resignation, on the petition of his successor.

ATTORNEY AND CLIENT — **CHAMPERTYOUS CONTRACT.** — An agreement by an attorney at law to prosecute a suit in which he had no previous interest, and to receive as compensation a stipulated sum in excess of the value of his services if successful, and nothing if the case was lost, is contrary to public justice and professional duty, and is void for champerty and maintenance. And the contract being illegal, the law does not imply a promise to pay the attorney what his services were worth, and the client may maintain an action against him for all he received, less any costs properly paid by him.

PROBATE appeal. One Mary Dominique was killed by a locomotive on a railroad, and her husband, a man of no property, employed an attorney to prosecute the company, agreeing to pay him one thousand dollars for his services and expenses in conducting the suit. Judgment was obtained against the company, and a fine of two thousand dollars was imposed, which, with the costs of prosecution, was collected by the attorney, who paid the costs to the county. Butler, the appellant, who had been appointed guardian of the minor children of the deceased, being informed of Dominique's agreement, settled with the attorney according to its terms, receiving from him one thousand dollars, and allowing him to retain the balance of the fine; and he also settled an account in the probate court, charging himself with the one thousand dollars he had received from the attorney. He then resigned, and Legro, the appellee, was appointed guardian, and upon his petition the probate court ordered Butler to file a further account. Butler filed a second account charging himself with the other one thousand dollars, not included in the first, and discharging himself by the same amount paid the attorney as counsel fees. The probate judge allowed four hundred dollars as counsel fees, and Butler took this appeal, claiming that he should be allowed the whole amount retained by the attorney.

interest in such property along their route, and may procure insurance thereon in their own name and behalf. If the courts of Vermont had given a construction to this statute, it would be followed, upon the principle, generally if not universally recognized, that the judicial department of every government is the appropriate organ for construing the legislative acts of that government: *Elmendorf v. Taylor*, 10 Wheat. 157, 159. But we have been unable, by our own research or by the aid of counsel, to find any case where the courts of Vermont have been called upon or have undertaken to give a legal construction of the statute upon the question whether it was intended to change the common-law liability of railroad corporations in cases of injury by fire from locomotive-engines, or whether it was designed to affect the remedy merely, by enacting that proof of the fact that the fire was communicated by a locomotive should be *prima facie* evidence of negligence of the company. If the statute changes the common-law liability of the defendants, the ruling of the court was right. If it relates merely to the mode of trial and the remedy, the common-law rule should have governed the trial.

In *Cleavelands v. Grand Trunk R. R. Co.*, 42 Vt. 450, which is the only case in the courts of Vermont under this statute to which our attention has been directed, the question was not raised or considered. The court say: "The plaintiffs claimed, and the evidence tended to prove, that the fire by which their property was destroyed originated by fire communicated by an engine of the defendants. The plaintiffs were not bound to prove anything further in the first instance." The burden then, under General Statutes, chapter 28, section 78, was cast on the defendants, in order to exonerate themselves from liability for the plaintiff's loss, of showing "that they had used all due caution and diligence, and employed suitable expedients to prevent such injury." The question whether the plaintiffs, under the statute, were required to prove negligence of the defendants by a preponderance of evidence upon the whole case, or whether the defendants were required to prove affirmatively, by a preponderance of evidence, that the fire was not caused by their negligence, was not discussed, and the language of the court is consistent with either view. There being no preponderance of evidence either way upon the question of negligence, in the one case the defendants would be entitled to a verdict, and in the other the plaintiffs would be entitled to the verdict. And this is the

point of difference upon this branch of the case. The defendants contend that the reasonable construction of the statute leaves the burden of proof upon the whole case upon the plaintiff, as at common law, to show, by a preponderance of evidence, that the injury was caused by the defendants' negligence. On the other hand, the plaintiff claims that the effect of the statute is to shift the burden of proof, upon the question of negligence, from the plaintiff to the defendants, and to require the defendants to show, by a preponderance of all the evidence in the case, that the injury was not caused by the defendants' negligence; and so the statute has changed the common law, and increased the liability of railroad corporations by imposing upon them the burden of showing affirmatively "that they have used all due caution and diligence, and employed suitable expedients to prevent such injury."

Richardson v. Grand Trunk R'y Co. was an action under this statute, brought in the circuit court of the United States for the district of Vermont. The court charged the jury "that the burden of proof was upon the plaintiffs, in the first instance, to show that the fire in question was communicated from some of the defendant's locomotive-engines to the bridge; and that if the jury were satisfied of that fact, by a fair balance of evidence, then the plaintiffs were entitled to recover, unless the defendant had established, by a fair balance of evidence, that it had used all due caution and diligence, and had employed all suitable expedients to prevent the fire; that the burden of proof was on the defendant as to the latter branch of the case." This was excepted to. On error to the supreme court of the United States, upon this point, the court say: "We see no just ground of complaint of the affirmative instruction given to the jury. It was in accordance with the rule prescribed by the statute; and there seems to have been no controversy in the circuit court respecting the question whether, if the fire was communicated to the bridge by a locomotive, it caused the injury to the plaintiffs": *Grand Trunk R'y Co. v. Richardson*, 91 U. S. 454, 459, 474. So far as this case may be regarded as a precedent upon the construction of the statute, it would seem to be an authority in favor of the plaintiff.

In some jurisdictions the rule is adopted by the courts that the destruction of property by fire from a locomotive raises a presumption of negligence, meaning thereby that proof of the

escape of fire from a locomotive is *prima facie* evidence of negligence: *Shearman and Redfield on Negligence*, sec. 333; *Clemens v. Hannibal etc. R. R. Co.*, 53 Mo. 366; 14 Am. Rep. 460; *Burke v. Louisville etc. R. R. Co.*, 7 Heisk. 451; 19 Am. Rep. 618; *Atchison etc. R. R. Co. v. Stanford*, 12 Kan. 354; 15 Am. Rep. 362; *Spaulding v. Chicago etc. R. R. Co.*, 30 Wis. 110; 11 Am. Rep. 550. This rule is based upon the fact that locomotives properly constructed, in suitable condition, and properly managed, do not ordinarily scatter fire; and also upon the fact that the information as to the condition, construction, and management of their engines, as well as the means of rebutting the charge of negligence, are peculiarly in the possession of the company. A similar rule has been recognized in this state in cases of injury to animals rightfully upon a railroad track: *White v. Concord R. R. Co.*, 80 N. H. 188; *Smith v. Eastern R. R. Co.*, 35 Id. 356. In these cases, however, negligence is the gist of the liability; and the burden of proving negligence by a preponderance of evidence is on the plaintiff.

The defendants contend that the Vermont statute is merely a legislative enactment of the rule adopted by the courts in the foregoing cases, designed to affect the order of proof at the trial, and not intended to impose any additional burden upon the defendants; and that under the statute the defendants are required only to counteract the evidence of negligence arising from proof that the fire was communicated by a locomotive, and that they are not required to prove by a preponderance of evidence that they were not negligent; that the burden still remains as at common law upon the plaintiff to prove negligence, and not upon the defendants to disprove it. The fact that the statute recognizes negligence as the gist of liability favors this view. On the other hand, it is argued that the statute is not a mere rule prescribing the order of trial; that it was the intention of the legislature to enlarge the common-law liability of railroad corporations, on account of the increased hazard to contiguous buildings and property by reason of the use of locomotive-engines, and to secure greater care in their operation and management by enacting a more rigorous rule than that imposed by the common law; that the statute was designed in general terms to make such corporations responsible in damages for all injuries caused by fire from locomotives, allowing this liability to be avoided only by showing affirmatively that they were free from fault.

We are inclined to this view. It seems to be the fair and reasonable interpretation of the language of the statute. If it had been the intention of the legislature simply to enact a rule of procedure, not affecting the question of liability, it is reasonable to assume that it would have been expressed in unambiguous language. If the purpose was to impose an absolute liability in all cases unless the company could exonerate themselves by showing affirmatively that they "had used all due caution and diligence, and employed suitable expedients to prevent such injury," it is not readily apparent how that purpose could be more clearly expressed.

This view of the construction of the statute is confirmed by the reasoning of the court in *Wakefield v. Conn. etc. R. R. Co.*, 37 Vt. 330, 86 Am. Dec. 711, which was an action to recover damages for injuries caused by the neglect of an engineer to ring the bell or sound the whistle at a crossing, as required by the statutes of Vermont. In the opinion of the court, Barrett, J., says: "By section 55, chapter 28, General Statutes, it is required that on every locomotive-engine the bell shall be rung, or the steam-whistle blown, at least eighty rods from the crossing. . . . In section 55 the requirement is affirmative and unconditional; but in section 56 it is enacted that if any railroad corporation shall unreasonably neglect or refuse to comply with the requisition of the preceding section, they shall forfeit for every such neglect or refusal a sum not exceeding two thousand dollars. The corporation could not be subjected to that penalty unless such neglect or refusal should be shown to be unreasonable. This clearly implies that in contemplation of the law there may be cases in which such neglect or refusal would be reasonable; and if reasonable, the penalty would not be incurred. In a prosecution for the penalty, the burden would be upon the prosecutor of showing the neglect or refusal to have been unreasonable; and upon first impression it might seem that the rule as to the liability of the corporation is the same *civiliter* as *criminaliter*. But on very full consideration the court are unable to adopt that view. At common law it would be the duty of the corporation to exercise all reasonable care in the running of engines, and in the general use of the railroad, and to adopt all proper precautions against accident; and the faulty neglect of the corporation in these respects would, when affirmatively shown, subject them to liability for injuries caused thereby. We think the provision of the fifty-fifth section was designed to operate

more stringently in this respect than the common law; and while it was not designed to subject the corporation to civil liability, entirely regardless of the circumstances and occasion of the omission to ring the bell or blow the whistle in all cases of injury by such omission, still it was designed to require, as the general rule, that the bell should be rung or the whistle blown in all cases; and in case of injury by reason of an omission to do so, to impose the burden on the corporation of showing that such omission, in the exercise of a sound judgment by the engineer, in view of the condition of things as they existed at the time, was reasonable and prudent. When, therefore, in a case like the present, the plaintiff would show that the alleged injury was caused by such omission, it would not be necessary to his right of recovery that he should take the burden of showing affirmatively that such omission was unreasonable and imprudent; but it would rest on the defendant, as matter of defense, to show that it was reasonable and prudent."

The reasoning of the court in *Wakefield v. Conn. etc. R. R. Co.*, *supra*, is applicable to the present case. It is a construction by the supreme court of Vermont of sections 55 and 56 of chapter 28 of the General Statutes of Vermont, relating to railroads. We are considering section 78 of the same chapter. Sections 55 and 56 provide, in substance, that railroad corporations shall be responsible in damages for injuries caused by omission to ring the bell or blow the whistle, unless they shall show that such omission was reasonable and prudent under the circumstances of the case. Section 78 provides that railroad corporations shall be responsible in damages for injuries caused by fire, unless they shall show that they have used all due caution and diligence, and employed suitable expedients to prevent such injuries. Upon the point in question, the cases are analogous, and we think that the ruling of the court, at the trial, upon this branch of the case, and the charge to the jury upon the burden of proof, were correct. The charge upon that point was, in substance, the same as was given in *Richardson v. Grand Trunk R'y Co.*, *supra*.

The court ruled that the doctrine of contributory negligence was not applicable to this case. What constitutes contributory negligence, and how far it is a defense in cases of injury by fire from locomotive-engines, has been a subject of discussion in the courts in many jurisdictions, and the decisions are conflicting. Under our New Hampshire statute relating to the

liability of railroad corporations for damages by fire, the question of negligence does not arise: Gen. Laws, c. 162, secs. 8, 9; *Hooksett v. Concord R. R. Co.*, 38 N. H. 242; *Rowell v. Railroad*, 57 Id. 132; 24 Am. Rep. 59; and we have found no case where the question has been considered, or a construction given to the Vermont statute by the courts of Vermont. In the absence of any judicial interpretation of the statute by the courts of that state to guide us, we think the ruling was correct. It seems to be sustained by the rule of construction applied by the supreme court of Vermont in analogous cases. A preceding section of the same chapter (Gen. Stats. Vt., c. 28, sec. 47) makes it the duty of a railroad corporation to erect and maintain a legal fence on the sides of their road, and cattle-guards suitable and sufficient to prevent cattle and animals from getting onto the railroad; and provides that "until such fences and cattle-guards shall be duly made, the corporation and its agents shall be liable for all damages which shall be done by its agents or engines to cattle, horses, or other animals thereon, occasioned by want of such fences or cattle-guards." Under this statute, it is held that the duty of the railroad to erect and maintain fences along their road is absolute, and the question of contributory negligence on the part of the owner of animals injured through the want of such fences does not arise: *Mead v. Burlington etc. R. R. Co.*, 52 Vt. 278. A similar principle of interpretation excludes the defense of contributory negligence in cases of damage by fire. Such, we think, would be the construction of the statute by the Vermont courts, and it is immaterial what our construction would be if it were a New Hampshire statute.

In favor of this construction it may be argued that it is not only in harmony with the Vermont decisions in analogous cases, but it is the natural and reasonable interpretation of the language of the statute, "that the corporation shall be responsible in damages for such injury, unless they shall show that they have used all due caution and diligence, and employed suitable expedients to prevent such injury"; that the statute expressly declares in what cases the corporation shall be relieved from liability, and no other defense is recognized, except showing "that they have used all due caution and diligence, and employed suitable expedients to prevent the injury"; that unless these facts are shown, the liability of the corporation is absolute; and that, by the elementary rule of construction, *Expressio unius est exclusio alterius*, the defense

of contributory negligence is excluded in cases under this statute. The Vermont statute, like ours, gives railroad corporations an insurable interest, in their own name and behalf, in property exposed to danger along their route; and the suggestions of Cushing, C. J., in *Rowell v. Railroad*, 57 N. H. 132, 139, 24 Am. Rep. 59, would seem to be applicable here: "Contributory negligence does not furnish any defense to any action by the insured on the policy of insurance. Negligence, either of the railroad or of the land-owner, would not, according to the authorities, be a defense to an action by the proprietors to recover on their policy the amount of the loss insured. It would be odd enough if the proprietors could recover on their policy, and then turn round and defeat the property owner on the ground of contributory negligence." The jury were instructed that the defendants were not liable for fault, unless such fault occasioned the plaintiff's loss; and that they had the right to act, on the presumption that owners would take reasonable care of their own property. The instructions were correct.

Judgment on the verdict.

RAILROADS—INJURIES OCCASIONED BY FIRE.—Where property has been set on fire, and destroyed by fire which is shown to have escaped from a locomotive-engine, negligence is presumed upon the part of the railroad company, and the burden of proof is upon it to show absence of negligence by proving that the locomotive-engine was properly constructed, and carefully and skillfully managed: *Olemens v. Hannibal etc. R. R. Co.*, 53 Mo. 366; 14 Am. Rep. 460; *Spaulding v. Chicago etc. R. R. Co.*, 30 Wis. 110; 11 Am. Rep. 550; *Atchison etc. R. R. Co. v. Stanford*, 12 Kan. 354; 15 Am. Rep. 362; *Burke v. Louisville etc. R. R. Co.*, 7 Heisk. 451; 19 Am. Rep. 618, and note; *Gulf etc. R'y Co. v. Benson*, 69 Tex. 407; 5 Am. St. Rep. 74, and note 77, 78; *Union Pacific R'y Co. v. De Busk*, 12 Col. 204; *ante*, p. 221, and note 233, 234.

FIXTURES.—The owner of real property can, by express agreement, reimpress the character of personalty upon fixtures which have become such by annexation to his land: Note to *Lavenson v. Standard Soap Co.*, *ante*, p. 153. A building is not a part of the realty, where an agreement makes it the property of one who does not own the real estate upon which it is located: *Hamlin v. Parsons*, 12 Minn. 108; 90 Am. Dec. 284; *Goodman v. Hannibal etc. R. R. Co.*, 45 Mo. 33; 100 Am. Dec. 336, and note 337; *Dame v. Dame*, 38 N. H. 429; 75 Am. Dec. 195; compare *Meig's Appeal*, 62 Pa. St. 28; 1 Am. Rep. 372; *Central Branch R. R. Co. v. Fritz*, 20 Kan. 430; 27 Am. Rep. 175; *Waters v. Reuber*, 16 Neb. 99; 49 Am. Rep. 710; *Hinkley etc. Iron Co. v. Black*, 70 Me. 473; 35 Am. Rep. 346, and cases in foot-note.

BUTLER v. LEGRO.

[62 NEW HAMPSHIRE, 350.]

GUARDIAN AND WARD. — **GUARDIAN IS BOUND TO PROTECT THE RIGHTS OF HIS WARDS**, and is not only accountable for their money which he has received, but also for what it was his duty to collect.

GUARDIAN AND WARD — SETTLEMENT OF ACCOUNT BETWEEN. — When, on settlement of his account, the guardian does not account for a sum which it was his duty to collect, and did not, and the matter was not brought to the attention of the court, and the question of his liability therefor was not raised and considered in that settlement, the error may be corrected in a further account, ordered, after his resignation, on the petition of his successor.

ATTORNEY AND CLIENT — CHAMPERTYOUS CONTRACT. — An agreement by an attorney at law to prosecute a suit in which he had no previous interest, and to receive as compensation a stipulated sum in excess of the value of his services if successful, and nothing if the case was lost, is contrary to public justice and professional duty, and is void for champerty and maintenance. And the contract being illegal, the law does not imply a promise to pay the attorney what his services were worth, and the client may maintain an action against him for all he received, less any costs properly paid by him.

PROBATE appeal. One Mary Dominique was killed by a locomotive on a railroad, and her husband, a man of no property, employed an attorney to prosecute the company, agreeing to pay him one thousand dollars for his services and expenses in conducting the suit. Judgment was obtained against the company, and a fine of two thousand dollars was imposed, which, with the costs of prosecution, was collected by the attorney, who paid the costs to the county. Butler, the appellant, who had been appointed guardian of the minor children of the deceased, being informed of Dominique's agreement, settled with the attorney according to its terms, receiving from him one thousand dollars, and allowing him to retain the balance of the fine; and he also settled an account in the probate court, charging himself with the one thousand dollars he had received from the attorney. He then resigned, and Legro, the appellee, was appointed guardian, and upon his petition the probate court ordered Butler to file a further account. Butler filed a second account charging himself with the other one thousand dollars, not included in the first, and discharging himself by the same amount paid the attorney as counsel fees. The probate judge allowed four hundred dollars as counsel fees, and Butler took this appeal, claiming that he should be allowed the whole amount retained by the attorney.

Copeland and Edgerly, for the plaintiff.

J. Hatch, for the defendant.

STANLEY, J. The decision of a judge of probate regularly made upon matters within his jurisdiction is conclusive: *Bryant v. Allen*, 6 N. H. 116. But in order to make the decision upon the first settlement a discharge of Butler from liability for the one thousand dollars retained by the attorney, it must appear that the question was raised and considered in that settlement: *Allen v. Hubbard*, 8 Id. 487, 489. Butler did not account for that sum, and there is no evidence that the matter was brought to the attention of the court, and included in the decision then made: *Stearns v. Stearns*, 1 Pick. 157; *Stetson v. Bass*, 9 Id. 27; *Field v. Hitchcock*, 14 Id. 405. Moreover, Butler settled his first account and resigned his trust before the new guardian was appointed, and there was no one to look after the interest of the wards, and examine the account in their behalf: Schouler on Domestic Relations, sec. 372; Smith's Probate Law, 3d ed., 216.

The determination of the petition for the removal of Butler did not necessarily involve the question of his accountability in this action. Upon petition, a guardian may be removed whenever in the opinion of the judge it may be necessary or expedient: Gen. Laws, c. 184, sec. 5. The judge may have been of the opinion that Butler ought to account for the whole fine, and yet not have deemed it necessary or expedient to remove him.

Butler was bound to act judiciously and for the best interest of his wards: *Wyman's Appeal*, 13 N. H. 18. It was his duty to improve their estate frugally and without waste, collect their dues, pay their just debts out of their property in the most economical manner, and protect their rights: Gen. Laws, c. 184, sec. 3. He must account for their money, whether he received it or not, because he had the right to receive it, and it was his duty to collect it (*Tuttle v. Robinson*, 33 N. H. 104, 120), and he can discharge himself by showing any proper disbursements on their account. In no other way can the probate court supervise his administration of his ward's estate.

The contract of the attorney with Dominique was, in effect, to prosecute a suit in which he had no previous interest, for persons who had no means to pay for his services, and receive as compensation all that might be recovered not in excess of

one thousand dollars, regardless of labor, expense, or time bestowed. Agreements of this kind are contrary to public justice and professional duty, tend to extortion and fraud, and are champertous and void: *Ackert v. Barker*, 131 Mass. 436; *Christie v. Sawyer*, 44 N. H. 298, 303. Although there was no express stipulation that the attorney should have nothing if the case was lost, that was evidently the understanding. The suit was taken on shares. Dominique expected to pay nothing, and the attorney expected to receive nothing from any other fund than the product of the litigation. Instead of Dominique's being a debtor for the value or less than the value of legal services, the price agreed on included a large premium for the risk of failure. If the contract had been legal, the attorney would have been a litigating party, and a partner sharing the profit and loss of a speculation. The contract being illegal, the law does not imply a promise to pay him what his services were worth. As the client in such a case is not in equal fault, and is fully protected against the oppressive bargain, he may maintain an action for the whole amount received by the attorney, less any costs properly paid. If the attorney were not removed from office, his payment of the sum held in abuse of his official position could be made a condition of his retaining that position. The appellant is chargeable for all he could have recovered from the attorney, and is entitled to no compensation for services or expenses since the settlement of his first account.

Decree of probate court modified.

CHAMPERTOUS CONTRACTS OF ATTORNEYS. — This is the subject of an extended note to *Bowman v. Phillips*, *ante*, pp. 297-300.

GUARDIAN AND WARD. — As to the personal liability of a guardian for the care, collection, and expenditure of his ward's money and estate, see extended note to *Fessenden v. Jones*, 75 Am. Dec. 447-450. As to the duties and liability of guardians: *State v. Sloan*, 93 Mo. 253; 3 Am. St. Rep. 528, and note 531; *Gillet v. Wiley*, 126 Ill. 310; 9 Am. St. Rep. 587, and note.

ATTORNEY-GENERAL v. SHEPARD.

[62 NEW HAMPSHIRE, 222.]

STATUTES — MUNICIPAL CORPORATIONS. — AMENDMENT OF CITY CHARTER IS A LOCAL LEGISLATIVE QUESTION which may be submitted by the senate and house, either to the voters of the city or to the city council for decision.

MUNICIPAL CORPORATIONS — ENACTMENT OF ORDINANCE — VOTE OF LESS THAN QUORUM. — In the absence of express regulation to the contrary, a proposition is carried at a meeting of a board of aldermen by a majority of the votes cast, when the journal properly shows the presence of a quorum at the meeting, and it is not necessary that a quorum should vote.

QUO WARRANTO against E. N. Shepard, O. Pillsbury, and J. C. Thorne, to test the validity of their election as aldermen by the fourth ward of the city of Concord. The city charter divided the city into seven wards, and provided that each should choose one alderman, and that a majority of the board should be a quorum. An amendment of the charter provided that each ward should choose "as many aldermen as that ward is entitled to representatives to the general court," and that the amendment should be void unless the city government, or the inhabitants of the city, should "by a majority vote of the legal voters present, and voting thereon by ballot, determine to adopt the same": Laws of 1881, c. 255, secs. 1, 3, 11. This amendment was adopted by the common council April 29, 1882. At a meeting of the board of aldermen May 27, 1882, the roll was called, and all the members responded, except one, who was absent, and a message was received from the common council with the ordinance adopting the amendment. The ordinance was put to vote, and declared by the chair to be passed. Upon a call of the yeas and nays, three voted in the affirmative, three refused to vote, one of the latter being the member who called for the yeas and nays, and the chair declared the ordinance passed; and these facts appeared in the journal of the board. During the calling of the yeas and nays the chair read section 9 of the rules of the board, which requires every member present, when a question is put, to vote, unless excused by the board; and the chair requested each of the three non-voting members to vote, and each refused. At the next election of aldermen, the fourth ward, being entitled to three representatives, elected the three defendants.

C. P. Sanborn, for the plaintiff.

W. L. Foster, for the defendants.

R. A. Ray, for the city of Concord.

DOX, C. J. The amendment of the city charter was a local legislative question that could be submitted by the senate and house, either to the people of Concord, or to the city council elected by the people as their representatives for the general purpose of exercising such powers of local legislation and administration as may be delegated to municipalities: *State v. Hayes*, 61 N. H. 264, 319; *Central Bridge Co. v. Lowell*, 15 Gray, 106, 116; *Stone v. Charlestown*, 114 Mass. 214, 222; *Brick etc. Church v. New York*, 5 Cow. 538, 540, 541; *Perry v. Keens*, 58 N. H. 40; *Kelley v. Kennard*, 60 Id. 1, 3, 6. And the rejection of the amendment by the council would not render its subsequent adoption by the people unconstitutional.

There were seven aldermen. Four were a quorum. Six were present. Three voted for the adoption of the amendment, and the refusal of the other three to vote was inoperative. In the absence of express regulation, a proposition is carried in a town-meeting, or other legislative assembly, by a majority of the votes cast: *St. Joseph Township v. Rogers*, 16 Wall. 644, 664; *Dillon on Municipal Corporations*, sec. 44, p. 63, note 2; *Richardson v. Union Society*, 58 N. H. 187, 188. The exercise of law-making power is not stopped by the mere silence and inaction of some of the law-makers who are present. An arbitrary, technical, and exclusive method of ascertaining whether a quorum is present, operating to prevent the performance of official duty and obstruct the business of government, is no part of our common law. The statute requiring the presence of four aldermen does not mean that in the presence of four a majority of the votes cast may not be enough. The journal properly shows how many members were there when the vote was taken by yeas and nays; there was no difficulty in ascertaining and recording the fact; and the requirement of a quorum at that time was not intended to furnish a means of suspending the legislative power and duty of a quorum.

No illegality appears in the adoption of the amendment.

Judgment for the defendants.

MUNICIPAL CORPORATIONS. — In the absence of a statute to the contrary, a quorum of the common council of a city consists of a majority of the members elected, and such majority may not adopt a rule that a quorum shall consist of two thirds of the members elected: *Heiskell v. Mayor*, 65 Md. 125; 57 Am. Rep. 308. The acts of the majority present at a town-meeting bind not only the minority, but all who are absent: *Chamberlain v. Dover*, 13 Me. 466; 29 Am. Dec. 517.

MUNICIPAL CORPORATIONS. — Amendments to charters of municipal corporations take effect without acceptance by the municipality: *Lycorning v. Union*, 15 Pa. St. 166; 53 Am. Dec. 575.

BUTTRICK v. NASHUA AND LOWELL RAILROAD.

[62 NEW HAMPSHIRE, 412.]

CORPORATIONS — ATTACHMENT OF CORPORATE STOCK. — A transfer of stock in a dividend-paying corporation, not recorded by the proper officer in the record-book kept for the purpose, is ineffectual to pass the property as against attaching creditors without notice. And where the corporation itself attaches the stock, it is not chargeable with knowledge of such transfer possessed by one of its directors who took no part in causing the attachment to be made, and who had no knowledge of it.

CORPORATIONS. — DIRECTORS OF CORPORATION, AS SUCH, CAN ACT IN BEHALF of the corporation only as a board. Their power is not joint and several, but joint only.

BILL in equity, seeking to compel the defendant to issue to the plaintiff a certificate for fifty shares of its capital stock. In October, 1876, one Wood, who owned ninety-three shares of the defendant's stock, assigned fifty of them to the Appleton National Bank of Lowell, as collateral to secure his note to the bank for four thousand two hundred dollars, and Wood's certificate being surrendered, the defendant issued to the bank a certificate for that number of shares, stating therein that they were held by the bank as collateral. At the same time the remaining forty-three shares were pledged to the Maverick Bank of Boston. At the defendant's annual meeting in May, 1877, Dr. Graves was chosen a director, and he and the plaintiff at that time negotiated with Wood for the purchase of his shares, Wood finally agreeing to sell the fifty shares to the plaintiff, and the forty-three shares to Graves, at a certain price per share, in addition to the sum for which each lot of shares was held by the banks, and they severally agreed to take them at that price and to pay the sums for which the respective lots were held as collateral. The agreement was verbal, and nothing was paid at the time to Wood. In pursuance of the agreement, Wood executed and delivered to the

plaintiff, June 19, 1877, an irrevocable power of attorney, authorizing the Appleton Bank to transfer the fifty shares to the plaintiff, who then paid Wood a part, and soon afterwards the remainder, of the agreed price. In March, 1878, the plaintiff paid Wood's four-thousand-two-hundred-dollar note to the bank, received from it a transfer of the shares, and soon afterward called upon the defendant for a new certificate, which was refused. On July 11, 1877, the defendant brought suit against Wood, and caused the fifty shares to be attached, subsequently obtained judgment and execution, and were proceeding to levy on the shares when this bill was filed. Wood was treasurer of the defendant company until the annual meeting in May, 1877, and its acting treasurer until June 6, 1877; and Dr. Graves, one of the directors of the defendant company, had full knowledge of the transactions between Wood and the plaintiff at the time they were had, not officially, but through his contemporaneous bargain for and purchase of the forty-three shares. And no other officer of the defendant had any knowledge of the plaintiff's claim to the stock, or of its sale to him, until after the attachment. Under the defendant's by-laws, stock is "transferable by an assignment thereof on the books of the corporation, either personally or by power of attorney," and all transfers or assignments of stock are required to be made in a book kept for the purpose.

Sawyer and Sawyer, Jr., and C. R. Morrison, for the plaintiff.

W. W. Bailey and F. A. Brooks, for the defendant.

CARPENTER, J. A transfer of stock in a dividend-paying corporation, not recorded by the proper officer in the record-book kept for the purpose, is ineffectual to pass the property as against attaching creditors without notice: Gen. Laws, c. 148, secs. 10-12; c. 158, sec. 6; *Pinkerton v. Manchester etc. R. R.*, 42 N. H. 424; *Scripture v. Francestown Soapstone Co.*, 50 Id. 571, 585-589; *Fisher v. Essex Bank*, 5 Gray, 378; *Blanchard v. Dedham Gas Light Co.*, 12 Id. 213; *Shipman v. Aetna Ins. Co.*, 29 Conn. 245, 253; *Johnston v. Laflin*, 103 U. S. 804. If the defendants had no notice of the assignment to the plaintiff, they acquired by the attachment a valid lien.

Whether the agreement between Wood and the plaintiff made in May was valid under the statute of frauds (*White-*

more v. Gibbs, 24 N. H. 484; *Browne on the Statute of Frauds*, secs. 296-298), and whether Wood's knowledge of it could be imputed to the defendant (*Seneca Co. Bank v. Nease*, 5 Denio, 330, 337; *Platt v. Birmingham Co.*, 41 Conn. 255, 264-266), are questions which need not be considered. The validity of the agreement and the defendants' knowledge of it may be assumed. The contract was not executed, but executory. It was not a sale, but an agreement of Wood to sell, and of the plaintiff to buy.

If equity would enforce its specific performance against Wood and all claiming under him with notice, it would only do so upon a payment of the purchase-money. The legal title, together with a right to receive the stipulated price, remained in Wood. A purchase, or an attachment of the stock, subject to the contract, would not injure the plaintiff. No steps were taken to transfer the legal title to the plaintiff, and nothing was paid until June 19th. A creditor attaching the stock at any time before that day, with a full knowledge of all the facts, would have held Wood's right to the agreed price. Whether the defendants can levy upon and sell anything more than the legal title, subject as well to a right in the plaintiff to receive a transfer upon payment of the price as to the pledge to the bank, is a question not raised by the case.

The agreement was executed, the price paid, and the legal title as between the parties transferred to the plaintiff June 19th. If, before the attachment, the defendants had notice of this transaction, the plaintiff must prevail; otherwise, the defendants.

Inasmuch as Wood was not the defendants' acting treasurer, or otherwise in their employ, after June 6th, the defendants are not chargeable with his knowledge of the transaction of June 19th. They had, prior to the attachment, no notice of the transfer of the title to the plaintiff, unless they are to be charged with the knowledge of their director Graves. It does not appear that Graves had any authority except as one of seven directors, who, as such, can act in behalf of the corporation only as a board. Their power is not joint and several, but joint only: *Gen. Laws*, c. 148, sec. 3; *Despatch Line of Packets v. Bellamy*, 12 N. H. 205; 37 Am. Dec. 203; *Edgerly v. Emerson*, 23 N. H. 555, 566-569; 55 Am. Dec. 207; *National Bank v. Norton*, 1 Hill, 572; *Bank v. Canal Co.*, 4 Paige, 127; *D'Arcy v. Railway Co.*, L. R. 2 Ex. 158. They may appoint

officers and agents, with such powers as they may find convenient or necessary: Gen. Laws, c. 148, sec. 3. They may confer on one of their associates a special or general authority, or, without their action, the corporation may make one of their directors a special or general agent by their course of dealing, and by holding him out to the world as such. In the absence of such authority, a director cannot, by his individual action, bind or affect the rights of the corporation. Notice to him is not in law notice to the corporation: *Washington Bank v. Lewis*, 22 Pick. 24, 31; *Commercial Bank v. Cunningham*, 24 Id. 270, 276; 35 Am. Dec. 322; *Atlantic State Bank v. Savery*, 82 N. Y. 291; *New Haven etc. R. R. v. Chatham*, 42 Conn. 465, 480. They are not affected by his knowledge, unless they move in the business to which the knowledge is material through the agency of such director acting either alone or as one of the board: *National Sec. Bank v. Cushman*, 121 Mass. 490; *Bank of United States v. Davis*, 2 Hill, 451, 463; *Westfield Bank v. Cornen*, 37 N. Y. 320; *Holden v. New York etc. Bank*, 72 Id. 286, 294; *Farmers' etc. Bank v. Payne*, 25 Conn. 444; 68 Am. Dec. 362; *Farrel Foundry v. Dart*, 26 Conn. 376.

It does not appear that Graves took any part in causing the attachment to be made, or that he had knowledge of it, or of Wood's indebtedness to the defendants.

Bill dismissed.

CORPORATIONS. — As to the liability of a transferee of stock for unpaid calls, see note to *Planing Mill Co. v. Savings Bank*, 6 Am. St. Rep. 838-840.

AN ATTACHMENT OF STOCK WITHOUT NOTICE OF ASSIGNMENT takes precedence thereover, when the assignment has not been perfected upon the books of the corporation: *Fort Madison L. Co. v. Batavian Bank*, 71 Iowa, 270; 60 Am. Rep. 789; note to *Colt v. Ives*, 81 Am. Dec. 169.

CERTIFICATES OF CORPORATE STOCK are not negotiable instruments, and an assignee thereof takes subject to equities and defenses: *Young v. South T. I. Co.*, 85 Tenn. 189; 4 Am. St. Rep. 752, and cases in note 759; but a purchaser of stock standing in the name of his vendor on the corporation's books, in good faith, for value, does not hold such stock subject to equities of third persons of which he has no notice: *Caulkins v. Gas Light Co.*, 85 Tenn. 683; 4 Am. St. Rep. 786; compare *Supply Ditch Co. v. Elliot*, 10 Col. 327; 3 Am. St. Rep. 586.

CORPORATIONS. — The legal title to shares of corporation stock, assignable only upon the corporation's books, does not pass by an assignment of the shares, which is not made and recorded upon such books: *Lippitt v. American etc. Co.*, 15 R. I. 141; 2 Am. St. Rep. 886, and note 891.

CORPORATIONS. — The knowledge of an officer of a corporation may be imputed to the corporation: *Atlantic Mills v. Indian Orchard Mills*, 147 Mass. 268; 9 Am. St. Rep. 698, and note.

CORPORATIONS. — THE CORPORATE POWERS OF A CORPORATION can only be exercised by a board of directors, when the majority are duly assembled and acting as a board under the provisions of law: *Gaskwiler v. Willis*, 23 Cal. 11; 91 Am. Dec. 607, and note; *Regents v. Williams*, 9 Gill & J. 365; 31 Am. Dec. 72.

WHEELER v. TRADERS' INSURANCE COMPANY.

[62 NEW HAMPSHIRE, 450.]

INSURANCE — FIRE — CONSTRUCTION OF PROHIBITIVE CLAUSE IN POLICY. —

Where a stipulation provides that the policy shall be avoided by the use of an article expressly named, and there is nothing in the policy from which a permission to use the article in a partial, limited, or temporary way can be inferred, full effect is usually given to the prohibitive clause by a forfeiture of the policy for its violation.

INSURANCE — FIRE — VIOLATION OF CONDITION IN POLICY FORFEITING IN-

SURANCE. — Stipulation in policy, that "if the assured shall keep or use . . . petroleum, naphtha, gasoline, benzine, benzole, or benzine varnish, or keep or use camphene, spirit gas, or any burning fluid or chemical oils, without written permission in this policy, then, and in every such case, this policy is void, and all insurance thereunder shall immediately cease and determine," is a part of the contract of insurance, and a reasonable restriction against the use of dangerous and combustible materials; and the use by the assured of naphtha or benzine on the insured premises avoids the policy and forfeits the insurance, unless such use was one incidental to the business, adopted from necessity or custom, and recognized by the insurer, or was in small quantities for a special and not dangerous purpose.

MOTION for a rehearing in the case of *Wheeler v. Insurance Co.*, 62 N. H. 326. The action was *assumpsit* on a policy of insurance on the plaintiff's woolen-mill and contents, which were burned May 23, 1879. The policy contained a stipulation which is set out in the opinion. The fire broke out about noon; and it appeared that about eleven o'clock the plaintiff, for the purpose of killing moths in some wool, took into the mill a barrel of naphtha, and sprinkled the liquid several times from a watering-pot upon the wool at the opposite end of the room from the cask. The fire broke out about thirty feet from the wool, and spread rapidly to it. The plaintiff bought the naphtha for use in destroying the moths, and intended to remove it from the building after sprinkling the wool. In the morning there was a fire under the boiler to heat the dye-vats, which was not replenished after nine o'clock. Nothing more is known of the origin of the fire than that above stated.

Marston and Eastman, and J. S. H. Frink, for the plaintiff.

S. C. Eastman, for the defendant.

ALLEN, J. The stipulation in the policy, that "if the assured shall keep or use . . . petroleum, naphtha, gasoline, benzine, benzole, or benzine varnish, or keep or use camphene, spirit gas, or any burning fluid or chemical oils, without written permission in this policy, then and in every such case this policy is void, and all insurance thereunder shall immediately cease and determine," was a part of the contract of insurance entered into by the plaintiff with the defendants, without any apparent mistake, deception, or fraud. The plaintiff expressly agreed that a violation of the condition should, of itself, be a forfeiture of all insurance under the policy. Having voluntarily entered into the contract thus restricted, the plaintiff cannot reasonably complain of the enforcement of the forfeiture for a violation of the condition: *Mead v. Northwestern Ins. Co.*, 7 N. Y. 530; *Lee v. Howard Ins. Co.*, 3 Gray, 583; *Kelly v. Home Ins. Co.*, 97 Mass. 288.

There is no ambiguity in the meaning of the words used, or the sense in which they were employed, by which the plaintiff might have the benefit of a doubt: *Smith v. Mechanics' etc. Ins. Co.*, 32 N. Y. 399. The contract must be interpreted and the terms used must be defined in the light of the mischief intended to be avoided by the restriction. The prohibition of the keeping or use for any purpose, or for any measurable time, of an article so inviting to fire as that described in the case, was a reasonable prohibition, the violation of which, in any degree and for any time, would expose the insured premises to an extreme degree of danger; and to give the restrictive clause in the policy a construction which would permit the introduction into the premises of naphtha or benzine, and its use there for any dangerous purpose for any time, would be a practical nullification of that part of the contract. If it could be said that merely "keeping" it, not for sale, nor for any general use in the business of manufacturing, but for temporary storage, could not be within the prohibition intended by the parties to the contract, certainly the "use" made of it was one subject to the prohibition of the use of an article hazardous to an extraordinary degree, if the use of any combustible material ever could be.

The cases, in which a disregard of the prohibition of keeping or using extraordinarily hazardous articles has not been h

to work a forfeiture of the policy, are those where the use made was one incident to the business of the insured, adopted from necessity or custom, and recognized by the insurer, so that a waiver of the prohibitory clause followed. Such cases are: *Carlin v. Western Assurance Co.*, 57 Md. 515, 40 Am. Rep. 440, in which the prohibited oil was, at the time of the insurance, known by the insurers to be commonly used by the insured to lubricate machinery; *Buchanan v. Exchange Ins. Co.*, 61 N. Y. 26, where the oil was known to be commonly used for illuminating purposes; and *Whitmarsh v. Conway Ins. Co.*, 16 Gray, 359, 77 Am. Dec. 414, in which the inhibited article was known to be usually kept and dealt with as a part of a stock of goods in a country store insured. The use by the plaintiff of the benzine or naphtha did not come within the doctrine of any of these cases, nor was it a use in a small quantity as a medicine, or for other special and not dangerous purpose, as in *Williams v. Firemen's Fund Ins. Co.*, 54 N. Y. 569; 13 Am. Rep. 620.

The plaintiff claims that the policy was not forfeited by the use of the naphtha, because the use was not habitual, but temporary, and confined to a single occasion. The cases relied on as authority for this position are cases, for the most part, where there was no express stipulation or warranty against the use of the particular dangerous article or material in question, but only a prohibition in general terms of keeping hazardous things on the premises or of carrying on a different or more dangerous trade: *Dobson v. Sotheby*, Moody & M. 90; *Shaw v. Robberds*, 6 Ad. & E. 76. But where there is a stipulation that the policy shall be avoided on the use of an article expressly named, and there is nothing in the policy from which a permission to use the article, in a partial, limited, or temporary way, can be inferred, full effect has usually been given to the prohibitive clause by a forfeiture of the policy for its violation: *Glen v. Lewis*, 8 Ex. 607; *Faulkner v. Central Ins. Co.*, 1 Kerr, 279; *Worcester v. Worcester Ins. Co.*, 9 Gray, 27; *Matson v. Farm Buildings Ins. Co.*, 73 N. Y. 310; *Birmingham Ins. Co. v. Kroegher*, 83 Pa. St. 64; 24 Am. Rep. 147; *Cerf v. Home Ins. Co.*, 44 Cal. 320; 13 Am. Rep. 165.

No reason has been suggested by the plaintiff why the restrictive clause in the policy of insurance in this case should receive a construction by rules different from those applied to ordinary business contracts. The terms of the prohibitive clause are simple, well known, and in common use. There is

nothing ambiguous about them, and there can be no doubt as to their meaning. The stipulation was a plain, unqualified agreement that the policy should be forfeited if naphtha were used in the premises insured. It was a reasonable restriction against the use of a very dangerous and combustible material; and a construction which would uphold the policy, in spite of a plainly hazardous use of any substantial quantity of so dangerous a fluid on the premises, for any substantial time, would defeat the object for which the restriction was made.

Motion denied.

INSURANCE — CONDITIONS AGAINST COMBUSTIBLES AND DANGEROUS SUBSTANCES. — The fact that gunpowder is, by custom and usage, considered "general merchandise," does not take it out of the condition against using or keeping gunpowder in a store, where there is a policy of insurance upon a stock of "general merchandise" in such store: *Liverpool etc. Ins. Co. v. Van Os*, 63 Miss. 431. Compare *Lancaster Fire Ins. Co. v. Lenheim*, 89 Pa. St. 497; 33 Am. Rep. 778, and particularly extended note 781-784, as to conditions generally in fire insurance policies against combustibles, such as "turpentine, benzine," and other dangerous materials. But a condition against keeping or using on the premises "petroleum, naphtha, benzine, benzole, gasoline, benzine varnish, etc.," or "camphene, spirit gas, or any burning fluid or chemical oils," does not prohibit the using one or more of such substances temporarily for cleaning machinery, etc.: *Mears v. Humboldt Ins. Co.*, 92 Pa. St. 15; 37 Am. Rep. 647; compare *Matson v. Farm Buildings Ins. Co.*, 73 N. Y. 310; 29 Am. Rep. 149; *Carlin v. Western Assur. Co.*, 57 Md. 515; 40 Am. Rep. 440; *Bennett v. North British etc. Ins. Co.*, 81 N. Y. 273; 37 Am. Rep. 501; *Maryland Fire Ins. Co. v. Whiteford*, 31 Md. 219; 1 Am. Rep. 45; *Morse v. Buffalo Fire Ins. Co.*, 30 Wis. 534; 11 Am. Rep. 587; *Cerf v. Home Ins. Co.*, 44 Cal. 320; 13 Am. Rep. 165; *Williams v. Firemen's Fund Ins. Co.*, 54 N. H. 569; 13 Am. Rep. 620; *Hall v. Insurance Co.*, 58 N. Y. 292; 17 Am. Rep. 255; *Birmingham Fire Ins. Co. v. Kroegher*, 83 Pa. St. 64; 24 Am. Rep. 147, and note 150. The mere keeping of articles denominated as hazardous in a policy of insurance after the issuing of such policy, if prohibited therein, does not render the policy void, but only suspends it while the prohibited articles are kept on the premises: *Phoenix Ins. Co. v. Lawrence*, 4 Met. (Ky.) 9; 81 Am. Dec. 521; but where saltpeter is prohibited from being kept upon the premises, and is kept there for the purpose of sale as an article of merchandise, the policy is avoided thereby: *Commercial Ins. Co. v. Mehlman*, 48 Ill. 313; 95 Am. Dec. 543.

BARKER v. JONES.

[62 NEW HAMPSHIRE, 457.]

CO-TENANCY. — TENANT IN COMMON IS ENTITLED TO PARTITION WITHOUT ENTRY, actual possession, or judgment in a writ of entry, against a co-tenant in actual and exclusive possession.

PAYMENT. — PRESUMPTION THAT DEBT IS PAID after the lapse of twenty years is a disputable one.

CO-TENANCY. — TAX TITLES BOUGHT BY ONE TENANT IN COMMON OF LAND CANNOT BE SET UP by him against his co-tenant, except for the purpose of enforcing equitable contribution.

BILL in equity, for a partition.

Barnard and Barnard, for the plaintiff.

E. A. Hibbard, for the defendant.

DOR, C. J. It is agreed that one fifth of the title passed to the plaintiff by estoppel: *Robertson v. Wilson*, 38 N. H. 48. And he is entitled to partition without entry, actual possession, or judgment in a writ of entry, and notwithstanding the defendant's actual and exclusive possession. The plaintiff's title and right of possession are sufficient for the maintenance of this action without a technical seisin not included in his title and right. In this state the ancient doctrine of entry and seisin is largely obsolete. The plaintiff claims another fifth under a levy of an execution on a mortgagor's equity of redemption. But the mortgage has been foreclosed, and its covenants are effective as an estoppel against the mortgagor: *Fletcher v. Chamberlin*, 61 Id. 438. After twenty years the mortgage debt was presumed to be paid; but the presumption is a disputable one, and the fact is found that the debt was not paid.

The defendant claims all the land under tax titles which he has bought; but they are not a bar to this or any other real action in which the plaintiff's judgment may contain a condition requiring him to contribute his share of what the defendant has paid. There will be an accounting at the trial term, and a decree for a partition assigning the plaintiff one fifth of the land when he pays into court the amount equitably due from him for taxes paid and tax titles bought by the defendant.

Case discharged.

PAYMENT, PRESUMPTION AS TO. — All debts excepted out of the statute of limitations, unclaimed and unrecognized for twenty years, are presumed to have been paid; but this presumption may always be rebutted by satisfactory

and convincing evidence: *Gregory v. Commonwealth*, 121 Pa. St. 611; 6 Am. St. Rep. 804, and note 811; *Lewis v. Schwenn*, 93 Mo. 26; 3 Am. St. Rep. 511, and note 515. The North Carolina statute which declares a presumption as to payment after ten years embraces within its provisions bonds or "single bills" as well as notes and other demands therein enumerated: *Rogers v. Clements*, 98 N. C. 180. A statutory presumption as to the payment of money will prevail, even though he who is entitled to such money never demanded it or instituted proceedings to recover, where it was money received by a master from the sale of lands under partition proceedings: *Kerlee v. Corpening*, 97 Id. 330. A judgment obtained against one obligor upon a joint and several bond does not rebut the presumption of payment which may have arisen in favor of another obligor: *Hall v. Woodward*, 26 S. C. 557.

CO-TENANCY. — Right of a co-tenant to contribution from his co-tenants, where he has paid the taxes assessed against the whole common estate: *Preston v. Wright*, 81 Me. 306; 10 Am. St. Rep. 257, and note; *Wistar's Appeal*, 125 Pa. St. 526; 11 Am. St. Rep. 917; *Eads v. Retherford*, 114 Ind. 273; 5 Am. St. Rep. 611, and note 613.

CO-TENANCY. — Buying a tax title by one tenant in common, and taking a deed purporting to convey the interest of his co-tenants, are acts tending to show that he claims to hold adversely to them: *Ogleby v. Hollister*, 76 Cal. 136; 9 Am. St. Rep. 177; but a tenant does not dispossess his co-tenants by merely entering the common estate, and exercising the rights of ownership, under a tax deed: *Hudson v. Coe*, 79 Me. 83; 1 Am. St. Rep. 288, and note; *Hollerhoff v. Mead*, 38 Minn. 42.

ENTRY OF ONE CO-TENANT is the entry of all; and possession of one co-tenant is always presumed to be in accordance with the common title: *Hudson v. Coe*, 79 Me. 83; 1 Am. St. Rep. 288, and cases cited in note 295; and exclusive possession by a co-tenant who has taken a conveyance purporting to convey the property in severalty does not ordinarily oust his co-tenants: *Hignite v. Hignite*, 65 Miss. 447; 7 Am. St. Rep. 673, and note 674; *Odom v. Weatheres*, 26 S. C. 244.

PURCHASE BY ONE CO-TENANT of an outstanding superior title: Extended note to *Venable v. Beauchamp*, 28 Am. Dec. 83-85, and therein of tax titles acquired by one co-tenant which are held to inure to the benefit of all the joint owners. So one co-tenant cannot take advantage of his co-tenants by purchasing an outstanding title and asserting it against them: *Clements v. Oates*, 49 Ark. 242.

PARTITION. — For the purposes of partition of lands, the possession of one tenant in common is possession of them all, unless by actual ouster he holds adversely to the common title: *Hayes's Appeal*, 123 Pa. St. 110.

HALL v. BRACKETT.

[62 NEW HAMPSHIRE, 609.]

BONDS — OFFICER AND OFFICERS. — SURETIES IN OFFICIAL BOND OF BANK TREASURER ARE ESTOPPED by the recital therein of the fact that he "is treasurer" to deny that he was treasurer when the bond was given; and if the principal was then holding the office at the sufferance of the corporation, and not for a fixed term, and the bond purported to be given for an indefinite term, the only implied limitation of it is to the indefinite term which the sureties admitted he was holding. In such case, the liability of the sureties was not impliedly limited by the expiration and extension of the bank's charter.

ACTION of debt on an official bond given by the defendant Brackett as treasurer of a savings bank, the plaintiffs being the assignees of the bank. The bank's charter was granted in June, 1857, for twenty years, and was extended for that period in June, 1877, and the bank suspended business September 21, 1877. The charter required the treasurer to "give bonds in a sum not less than ten thousand dollars for the faithful discharge of his duty"; and provided that the treasurer and certain other officers should be elected by ballot, "hold their office for one year, and until others are chosen and have accepted in their stead." Brackett was elected treasurer at the first meeting, August 1, 1857, and held the office until the bank suspended business. He was not re-elected in any succeeding year, and no other person was chosen in his stead. Under a by-law, the corporation held a meeting each year on the second Wednesday of June. The bond in suit was given in requirement with the statute December 30, 1869, conditioned that "if the above-bounden John M. Brackett, who is treasurer of the Carroll County Five Cents Savings Bank of Wolfborough, shall faithfully discharge and perform all the duties incumbent on him as treasurer of said bank, agreeably to the laws of the state of New Hampshire, and in accordance with the charter and by-laws of said institution, then this obligation shall be void."

J. G. Hall, and Wiggin and Fernald, for the plaintiffs.

G. Marston and W. J. Copeland, for the defendants.

DOE, C. J. The defendants cannot deny the fact stated in the bond, that Brackett was treasurer of the bank when the bond was given. The bond contains no express limitation of its security to one official term; and if such a limitation is implied, the limited term is the one which the defendants ad-

mitted Brackett was holding at the date of the bond, December 30, 1869. By the charter, he was one of those who "hold their office for one year, and until others are chosen and have accepted in their stead." He was the only treasurer the bank ever had. He was elected in 1857; he has not been re-elected, and no other person has been chosen in his stead. In fact and in law he was treasurer from 1857 to 1877, when the bank's property passed into the hands of assignees. In 1869, when the defendants admitted he was treasurer, he was holding the office, not for a year, but for the indefinite period of the sufferance of the corporation, who could choose another person as his successor at any time. The view most favorable to the sureties is, that the bond covers this indefinite period, and that they would not have been held for this performance of his duties after a re-election.

Dover v. Twombly, 42 N. H. 59, 68, and many other cases, sustain "the doctrine that a surety is bound for the conduct of the officer during the term to which his then appointment extended, and not beyond." In this case, the only annual term the principal ever held had expired eleven years before the bond was given. There was no term of a year to which the bond can be limited. If its language is qualified by implication, the qualification is introduced by the actual, and not by an imaginary, state of things,—by the tenure of sufferance on which he was holding the office, and not by an election that did not occur, and an annual term that did not begin. The admission, signed and sealed by the defendants December 30, 1869, that Brackett "is treasurer," can refer to no other term than the indefinite one he was then holding. The provision of the charter, that he and others "shall hold their office for one year, and until others are chosen and have accepted in their stead," excludes the fiction that his non-election after 1857 was an annual election. The bond covers any default that occurred during the continuance of the indefinite term for which it was given: *Mayor v. Wright*, 16 Q. B. 623; *Curling v. Chalklen*, 3 Moore & S. 502; *Dedham Bank v. Chickering*, 3 Pick. 335; *Amherst Bank v. Root*, 2 Met. 523; *Chelmsford Co. v. Demarest*, 7 Gray, 1, 6; *Cambridge v. Fifield*, 126 Mass. 429; *Commonwealth v. Reading Bank*, 129 Id. 73; *Richardson v. Dean*, 130 Id. 242, 244; De Colyar on Guaranties, Am. ed. 1875, 260; Murfree on Official Bonds, sec. 632.

There are authorities in conflict with *Exeter Bank v. Rogers*,

7 N. H. 21 (Thompson on Liabilities of Officers, 515); but it is the settled law of this state that the liability of the sureties was not limited by the expiration and extension of the bank's charter.

Case discharged.

SURETYSHIP — OFFICIAL BONDS. — The undertaking of a surety upon an official bond must be strictly construed: *Note to First Nat. Bank v. Gerke*, 6 Am. St. Rep. 458.

ESTOPPEL BY RECITALS IN BONDS. — The surety of a guardian upon the guardian's bond, executed to enable him to sell his ward's money, is estopped, after sale and receipt of the money, to deny his principal's appointment as guardian, as recited in the bond: *Gray v. State*, 78 Ind. 68; 41 Am. Rep. 545. So recitals in a deed operate as an estoppel upon the parties thereto: *Orthwein v. Thomas*, 127 Ill. 554; 11 Am. St. Rep. 159, and note 173; and the obligors upon an injunction bond are estopped from denying the recitals contained therein: *Person v. Thornton*, 86 Ala. 308; so may one be estopped by the giving of a forthcoming bond: *Benesch v. Wagner*, 12 Col. 534; 13 Am. St. Rep. 254, and note 257; *Hill v. Nehms*, 86 Ala. 442.

PEARSON v. CONCORD RAILROAD CORPORATION.

[62 NEW HAMPSHIRE, 587.]

CORPORATIONS. — DIRECTOR OF RAILROAD CORPORATION, THOUGH NOT TECHNICALLY A TRUSTEE, stands in a fiduciary relation to the corporation, and is under the disability of a trustee.

CORPORATIONS. — STOCKHOLDER IN CORPORATION SUSTAINS TO DIRECTORS the relation of a *certainum* *trust*, and a court of equity will interfere, at the suit of a stockholder, to enjoin the action of common directors of two railroad corporations in respect to matters where the interests of the roads are in conflict.

CORPORATIONS — DIRECTORS ACTING FOR TWO CORPORATIONS WHERE INTERESTS ARE CONFLICTING. — The managers of a railroad corporation, acting for it and in its interests, bought a controlling interest in the stock of a connecting road for the purpose of making with themselves, as controlling managers of the latter road, contracts more favorable to the former, and they accomplished that purpose. In a suit brought by a stockholder to restrain the execution of the contracts, the inquiry whether they are fair and just is wholly immaterial. And the court may appoint a trustee in such case to manage those affairs of the disabled company which the trustees (directors) are legally incapacitated to perform.

TRUSTS. — LAW DOES NOT SUFFER TRUST TO FAIL FOR WANT OF TRUSTEE, and this principle applies as well when, without legal remedy, the fiduciary failure would be partial as when it would be total.

CORPORATIONS. — RAILROAD CORPORATION CANNOT BECOME STOCKHOLDER IN ANOTHER RAILROAD CORPORATION for the purpose of controlling the business or affecting the management of the latter, unless such power is given by statute, or is necessarily implied in its charter.

BILL in equity, in the nature of a bill *quia timet*, filed by J. H. Pearson, a stockholder of the Concord Railroad Corporation, in behalf of himself and all other stockholders who may join in the suit, except the defendants, against the Concord Railroad Corporation, and its directors, the Northern Railroad, the Concord and Claremont Railroad, the Sugar River Railroad, the Contoocook River Railroad, the Boston, Concord, and Montreal Railroad, the Nashua and Lowell Railroad, and the Boston and Lowell Railroad, praying that the contracts hereinafter mentioned be set aside and declared void, and that the defendants be forever enjoined from acting under them; that a suitable person or persons be appointed by the court to act on behalf of the Concord company in respect to those matters where the directors are legally disqualified by reason of their representing adverse interests; and for an account, and for general relief. The facts, as found by a referee, are in substance as follows: Lyon was president of the Boston, Concord, and Montreal Railroad from 1861 until his death, April 11, 1878, and a director of the Concord Railroad from 1878 until his death, and was a stockholder in each company. He was succeeded as a director in both companies by Vose, his executor, who has been president of the former company since the death of Lyon, and of the latter company since the death of Stearns, in December, 1878. At the time of his death, Stearns was president of the Northern and the Concord companies, having been identified with the former from its beginning, and being elected director and president of the latter in May, 1873. The board of directors of the Concord company consisted of seven members, a majority of whom have been directors of the Boston, Concord, and Montreal, and the Northern companies, from the annual meeting in 1874 to the time the plaintiff filed his bill. Stearns and Lyon were, by the yearly votes of the Concord directors, the executive committee of the board, with power to direct the operation of the road, and make all necessary purchases and contracts therefor, subject to the approval of the board, from June, 1873, until they died, when Lyon was succeeded by Vose, and Stearns by Kimball. Prior to the annual meeting of the Concord in May, 1873, Stearns and Lyon purchased of Johnson about eight thousand shares of Concord stock at a price largely in excess of its market value, Johnson procuring the stock from persons then composing the board of directors of the Concord company; and since this purchase the Northern

has owned stock in the Concord, and has voted thereon at the annual meetings of the latter, the amount so voted on at the annual meeting in May, 1879, being 1,290 shares. The purchase was made with the purpose of obtaining the control of the Concord road, and thereby secure more favorable contracts for the business of the Northern and the Boston, Concord, and Montreal over the lower roads, to which they were entitled; and the effect of the purchase was to vest the control of the Concord in the hands of the Boston, Concord, and Montreal and the Northern companies, and to elect common directors, who have controlled the management of the Concord. The directors have acted honestly and fairly in the discharge of their joint duties, but as the result of such directorship, the income of the Concord has been diminished, and that of the other companies increased. In 1865, the Concord made a contract with the Nashua and Lowell companies by which the business of the upper roads was forced over those roads at increased rates, which the upper roads remonstrated against and opposed as oppressive and unjust; but they withdrew their opposition upon the promise of the then manager of the Concord "that he would make it just as well for the upper roads as though the contract were not executed." The validity of the claims of the upper roads was not denied by the different boards of directors of the Concord company, and in 1878 the directors of the latter voted as a compromise to pay each of the former a certain amount, which offer does not appear to have been accepted. The contract of 1865 was terminated by the Lowell line prior to April 1, 1877, when the Concord company made contracts with the upper and lower companies, under which it received the same rates from both. Other facts appear in the opinion.

Bingham and Mitchell, G. Marston, E. Burks, and E. B. S. Sanborn, for the plaintiff.

Chase and Streeter, and J. Y. Mugridge, for Concord Railroad Company and directors.

Pike and Parsons, and J. H. Benton, Jr., for Northern Railroad and Concord and Claremont Railroad.

Barnard and Barnard, for Boston, Concord, and Montreal Railroad.

J. H. George and W. L. Foster, for Boston and Lowell Railroad and Nashua and Lowell Railroad.

W. W. Bailey, for Nashua and Lowell Railroad.

SMITH, J. The gist of the referee's report is, the two upper companies were justly entitled to more favorable contracts for their business over the road of the Concord, and the upper companies (i. e., the managers acting for them and in their interests) bought a controlling interest in the stock of the Concord for the purpose of making with themselves, as controlling managers of the Concord, contracts more favorable to themselves; and they accomplished that purpose. The upper companies having bought Concord stock for the purpose of controlling that road for their own advantage, having exercised their control of it by making certain contracts with themselves, and having passed the vote of indemnity for their own benefit, the question is, whether they can be allowed, against the objection of a stockholder in the Concord, to execute their illegal contracts and their illegal vote, on the ground that the contracts and vote are just and fair, and such as the Concord ought to have made and passed.

A director of a railroad corporation, though not technically a trustee, stands in a fiduciary relation to the corporation, and is under the disability of a trustee. Practically, the directors are trustees, and the stockholders are the *cestuis que trust*. Like all other persons where this relation exists, he cannot, as buyer for his corporation, buy of himself against the objection of his *cestui que trust*, nor as seller for the corporation become the purchaser, nor, being its agent and trustee, contract with himself, or secure to himself advantages not common to other stockholders, because such contracts and relations are likely to bring him in conflict with his duty and self-interest, and tempt him to be unfaithful to the superior obligations he has assumed: *Pierce on Railroads*, 36; *Morawetz on Corporations*, sec. 245; *Angell and Ames on Corporations*, secs. 283, 312, note a; *Butts v. Wood*, 37 N. Y. 317; *Hoyle v. Plattsburgh etc. R. R.*, 54 Id. 314, 328; 13 Am. Rep. 595; *Blake v. Buffalo etc. R. R.*, 56 N. Y. 485, 490; *Barnes v. Brown*, 80 Id. 527, 535; *Duncomb v. New York etc. R. R.*, 84 Id. 190, 198; *Robinson v. Smith*, 3 Paige, 225, 232; 24 Am. Dec. 212; *Kochler v. Black River etc. Co.*, 2 Black, 715, 721; *Bliss v. Matteson*, 45 N. Y. 22; 1 Perry on Trusts, sec. 207; *Booth v. Robinson*, 55 Md. 419, 436, 440.

The plaintiff is a stockholder in the Concord, and sustains to the directors of the company the relation of a *cestui que trust*. He seeks an injunction to prevent the execution of these illegal contracts, and vote. Must he fail because they are, or may be shown to be, fair and just? On this question

the authorities are not unanimous. One class answers it in the affirmative, some of them putting upon the trustee the burden of proving fairness: *Coal and Iron Co. v. Parish*, 42 Md. 598; *Ashhurst's Appeal*, 60 Pa. St. 290; *Watts's Appeal*, 78 Id. 370. Others put upon the beneficiary the burden of proving fraud: *Buell v. Buckingham*, 16 Iowa, 284; 85 Am. Dec. 516; *Merrick v. Peru Coal Co.*, 61 Ill. 472. The second class answer it in the negative, and this is the view adopted by the author in *Pierce on Railroads*, 36, who says: "The rule is so strict that it does not permit, as against a disapproving *cestui que trust*, an inquiry into the good faith and fairness of a transaction which comes within it." And this is the law as settled in our own decisions.

In *Currier v. Green*, 2 N. H. 225, this court, speaking through Richardson, C. J., said that the rule that the agent of another in the sale of an estate is incapacitated to make a contract, which shall give him an interest in the purchase, "is founded on general principles of public convenience. As no court could be able in many cases to ascertain the truth, a contract of this kind is not permitted in any instance, however honest the circumstances may be, the general interests of the public requiring that it should be held to be invalid in every instance"; and he concluded by quoting from Sugden on Vendors, 392, as follows: "He that is intrusted with the interest of others cannot be allowed to make the business an object of interest to himself, because from the frailty of nature one who has the power will too readily be seized with the inclination to use the opportunity for serving his interest at the expense of those for whom he is interested."

In *Perkins v. Thompson*, 8 N. H. 144, 146, the same learned judge said: "If it were once decided in this court that a sheriff might be interested lawfully in the purchase of articles he himself was selling upon an execution, it would open an avenue to frauds for the detection of which our courts have very inadequate means. And it seems to us that every principle of public policy requires that we should at once close this avenue forever by holding that in no case can a sheriff be interested in the purchase of an article he is selling as a public officer, and by treating every such purchase as voidable, at the election of the debtor": See also *Brackett v. Tillotson*, 4 Id. 208.

In *Remick v. Butterfield*, 31 N. H. 70, 87, 89, 64 Am. Dec. 316, where the administrator overbid the purchaser in the

hope of getting a higher bid, and then persuaded him to take it off his hands, Mr. Justice Bell said: "We regard the whole transaction as dangerous and improper, and as illegal, giving no right to the administrator to hold the property, or to claim any conveyance under his bid." And again: "It is an abuse of authority which may be taken advantage of by any one whose interest is affected. Hence *cestuis que trust*, and all for whom the trustee or agent acted, have an option to avoid the sale and retain the property sold, or to confirm the sale and receive the consideration, as may be for their interest": See *Hoitt v. Webb*, 36 N. H. 158, 163; *Sparhawk v. Allen*, 21 Id. 9, 22-25; *French v. Currier*, 47 Id. 88, 98; *Hoit v. Russell*, 56 Id. 559, 564; *Ashuelot Railroad v. Elliot*, 57 Id. 397, 433-437, 439-442.

It hardly seems necessary to go to the reports of other jurisdictions for confirmation of a doctrine so firmly established in our own reports. There is a partial review of some of the leading cases in the opinion of Gilchrist, C. J., in *Sparhawk v. Allen*, 21 N. H. 9, 22-25. They confirm the doctrine as held in this state. It has been uniformly so held in England since the decision in *Holt v. Holt*, 1 Ch. Cas. 190, decided in 1670.

Judge Story says if "the seller were permitted, as the agent of another, to become the purchaser, his duty to his principal and his own interest would stand in direct opposition to each other, and thus a temptation, perhaps in many cases too strong for resistance by men of flexible morals, or hackneyed in the common devices of worldly business, would be held out, which would betray them into gross misconduct, and even into crime. It is to interpose a preventive check against such temptations and seductions that a positive prohibition has been found to be the soundest policy, encouraged by the purest precepts of Christianity": Story on Agency, secs. 210, 211. And again: "The principle applies, however innocent the purchase may be in a given case. It is poisonous in its consequences. The *cestui que trust* is not bound to prove, nor is the court bound to decide, that the trustee has made a bargain advantageous to himself. The fact may be so, and yet the party not have it in his power distinctly and clearly to show it. It is to guard against this uncertainty and abuse, and to remove the trustee from temptation, that the rule does and will permit the *cestui que trust* to come at his own option, and, without showing essential injury, to insist upon having the experiment of another sale": 1 Story's Eq. Jur., sec. 322.

Parsons lays down the rule thus: "If an agent to sell become the purchaser, or if an agent to buy be himself the seller, a court of chancery, upon the timely application of the principal, will presume that the transaction was injurious, and will not permit the agent to contradict this presumption, unless, indeed, he can show that the principal, when furnished with all the knowledge he himself possessed, gave him previous authority to be such buyer or seller, or afterwards assented to such purchase or sale": 1 Parsons on Contracts, 87, and cases cited, viz., *Coles v. Tresothick*, 9 Ves. 234, 247; *Lowther v. Lowther*, 13 Id. 103; *Ex parte Hughes*, 6 Id. 617; *East India Co. v. Henchman*, 1 Ves. Jr. 289; *Ex parte Bennett*, 10 Ves. 385; *Oliver v. Court*, 8 Price, 127; *Fox v. Mackreth*, 2 Brown Ch. 400; *York Buildings Co. v. Mackenzie*, 8 Brown Parl. C. 42; *Molony v. Kernan*, 2 Dru. & War. 31; *Murphy v. O'Shea*, 2 Jones & L. 422; *Davous v. Fanning*, 2 Johns. Ch. 252; *Moore v. Moore*, 5 N. Y. 256; *Conger v. Ring*, 11 Barb. 356; *Cumb. Coal and Iron Co. v. Sherman*, 30 Id. 553; *McConnel v. Gibson*, 12 Ill. 128; *Pensonneau v. Bleakley*, 14 Id. 15; *Dwight v. Blackmar*, 2 Mich. 330; 57 Am. Dec. 130; *Cluts v. Barron*, 2 Mich. 192; *Allen v. Bryant*, 7 Ired. Eq. 276; *White v. Trotter*, 14 Smedes & M. 30; 53 Am. Dec. 112; *Michoud v. Girod*, 4 How. 503; *Green v. Sargeant*, 23 Vt. 466; 56 Am. Dec. 88; *Buell v. Buckingham*, 16 Iowa, 284; 85 Am. Dec. 516. See also *Holt v. Holt*, 1 Ch. Cas. 190; *Hatch v. Hatch*, 9 Ves. 297; *Whelpdale v. Cookson*, 1 Ves. Sr. 9; *Hall v. Brown*, 3 Brown Ch. 177; *Keech v. Sandford*, 2 Eq. Cas. Abr. 741; *Aberdeen R'y Co. v. Blaikie*, 1 Macq. 461; *Lewis v. Hillman*, 3 H. L. Cas. 607, 629, 630; *In re Bloye's Trust*, 1 Macn. & G. 488, 495; *Ex parte James*, 8 Ves. 337; *Ogden v. Murray*, 39 N. Y. 202, 208; *Torrey v. Bank*, 9 Paige, 649, 664; *Gardner v. Ogden*, 22 N. Y. 327; 78 Am. Dec. 192; *Jewett v. Miller*, 10 N. Y. 402, 405; 65 Am. Dec. 751; *Duncomb v. New York etc. R. R.*, 84 N. Y. 190, 199; *Coleman v. Second Avenue R. R.*, 38 Id. 201; *Barnes v. Brown*, 80 Id. 527; *Van Epps v. Van Epps*, 9 Paige, 237, 242; *Bergen v. Bennett*, 1 Caines Cas. 19; 2 Am. Dec. 281; *Munro v. Alaire*, 2 Caines Cas. 183; 2 Am. Dec. 330; 4 Kent's Com. 438; *Raisin v. Clark*, 41 Md. 158; 20 Am. Rep. 66; *Yeackel v. Litchfield*, 13 Allen, 417; 90 Am. Dec. 207; *Rice v. Wood*, 113 Mass. 133, 135; 18 Am. Rep. 459; *Marsh v. Whitmors*, 21 Wall. 178, 183; *Wardell v. Union Pac. R. R.*, 103 U. S. 651, 658; *Goodin v. Cin. etc. Canal Co.*, 18 Ohio St. 169; 98 Am. Dec. 95; *Gilman*

etc. R. R. v. Kelly, 77 Ill. 426; *Harrington v. Victoria Dock Co.*, L. R. 3 Q. B. D. 549.

The reasons for the exclusion of all inquiry into the *bona fides* of the transaction are expressed in these cases with clearness and exactness. Mr. Justice Field said: "The two positions impose different obligations, and their union would at once raise a conflict between interest and duty; and constituted as humanity is, in the majority of cases duty would be overborne in the struggle": *Wardell v. Railroad Co.*, 103 U. S. 651; *Marsh v. Whitmore*, 21 Wall. 178, 183. "It is to avoid the necessity of any such inquiry, in which justice might be balked, that the rule takes so general a form": *Jewett v. Miller*, 10 N. Y. 402, 405; 65 Am. Dec. 751. "The rule is founded in the known weakness of human nature, and the peril of permitting any sort of collision between the personal interests of the individual and his duties as trustee in his fiduciary character": *Duncomb v. New York etc. R. R. Co.*, 84 N. Y. 190, 199. "It is founded in the danger of imposition, and the presumption of the existence of fraud which is inaccessible to the eye of the court. The policy of the rule is, to shut the door against temptation": *Van Epps v. Van Epps*, 9 Paige, 237, 242; 4 Kent's Com. 438. Lord Eldon gave as a reason, "that the inquiry is so easily baffled in a court of justice": *Hatch v. Hatch*, 9 Ves. 297. Lord Hardwicke said: "It is not enough for the trustee to say 'You cannot prove any fraud,' as it is in his power to conceal it": *Whelpdale v. Cookson*, 1 Ves. Sr. 9.

In *Hughs v. Watson*, decided in Scotland in 1846, cited in *Gardner v. Ogden*, 22 N. Y. 327, 347, 78 Am. Dec. 192, Lord Jaffrey said: "It is now *presumptio juris et de jure*, that where a person stands in these inconsistent relations of both buyer and seller, there are dangers, and it is not relevant to say that it is impossible there could be any in the particular case." Lord Cranworth said: "It may sometimes happen that the terms on which a trustee has dealt, or attempted to deal, with the estate or interests of those for whom he is trustee, may have been as good as could have been obtained from any other person; they may even, at the time, have been better. But still, so inflexible is the rule that no inquiry on that subject is permitted": *Aberdeen R'y Co. v. Blaikie*, 1 Macq. 461. The English authorities on this subject are numerous and uniform. Nothing less than incapacity is "able to shut the door against temptation, where the danger is imminent and

the security against discovery great. The wise policy of the law has, therefore, put the sting of disability into the temptation as a defensive weapon against the strength of the danger which lies in the situation": *York Buildings Co. v. Mackenzie*, 8 Brown Parl. C. 42; *Davoue v. Fanning*, 2 Johns. Ch. 252, 270.

In *Michoud v. Girod*, 4 How. 503, 557, the court said: "We are aware that cases may be found in the reports of some of the chancery courts in the United States in which it has been held that an executor may purchase, if he be without fraud, any property of his testator, at open and public sale, for a fair price, and that such purchase is only voidable, and not void, as we hold it to be. But, with all due respect to the learned judges who have so decided, we say that an executor or administrator is, in equity, a trustee for the next of kin, legatees, and creditors, and that we have been unable to find any one well-considered decision . . . to sustain the right of an executor to become the purchaser of the property which he represents, or any portion of it, though he has done so for a fair price, without fraud, at a public sale."

This case is within that class where the agent to sell is precluded by the policy of the law from purchasing. The Northern, Boston, Concord, and Montreal, and Concord companies are connecting roads. The upper companies have the right by statute to require the Concord to haul their passengers and freight over its road upon paying reasonable tolls therefor, and in turn they are required to do the same for the Concord. Rates for such transportation must be fixed by contract, or by referees appointed by the court upon petition of one of the parties: Gen. Laws, c. 164, secs. 8-9. The statute has provided a remedy, simple, adequate, inexpensive, expeditious, and effectual. The upper companies, feeling aggrieved by the tolls charged by the Concord, declined to seek redress under the statute, but sought a remedy by disabling the Concord to contract with them, and undertook to contract with a board of directors elected by themselves. The relation of the upper companies to the Concord was that of buyer and seller. The upper companies desired to purchase of the Concord the transportation of their freight and passengers over the road of the latter. The Concord desired to sell the transportation over its own road of the traffic of the upper roads. It was for the interest of the upper companies to procure the lowest rates, and their directors were bound to use the knowledge they had de-

rived from the confidence reposed in them as directors to attain that result; and the interest of the Concord was to procure the highest rates, and its directors were bound to use their special knowledge for the advantage of that company. Their interests being conflicting, it was impossible for common directors to procure the lowest rates for one party and the highest rates for the other. "No man can serve two masters." They were not arbitrators, called in to adjust conflicting claims, nor were they disinterested. The referee has found that the purchase of Concord stock at prices largely in excess of its market value was made with the intent and purpose of obtaining control of the Concord, and thereby to secure more favorable contracts for the business of the upper companies over the lower. The plan was formed, the purchase was made, the control of the Concord was obtained, and more favorable contracts were secured. By taking the control of the Concord, the upper companies disabled it as a contracting party. In fixing the rates of that company for their business, they were contracting with themselves. When a transaction is a fraud in law, it is unnecessary to prove a fraud in fact, nor is it permissible to show that the transaction was an honest one: *Coburn v. Pickering*, 3 N. H. 415; 14 Am. Dec. 375. The justness of the contracts made with themselves, and of the votes they passed as directors of the Concord Railroad for their own benefit, does not impart any validity or legality to those contracts or votes. If such contracts were to stand until shown to be fraudulent and corrupt, the result, as a general rule, would be that they must be enforced in spite of fraud or corruption: *Flint R'y Co. v. Dewey*, 14 Mich. 477.

A plea in trespass *quare clausum*, that the defendant was a creditor of the plaintiff, and entered upon his farm to take the crops in payment of his debt, is no better in ethics than in law. If the defendant in replevin or trover were to defend upon the ground that he was a creditor of the plaintiff, and took the goods in payment of his claim, he would scarcely need to be informed that the justness of his claim would be utterly immaterial upon the question of his right to enforce payment by committing a tort. A person may require a common carrier to transport his goods for a reasonable compensation. His refusal does not justify the former in seizing his teams, fixing reasonable rates, and compelling the carrier's servants to transport his goods at such rates. The reasonableness of the rates so fixed would impart no validity to the com-

pulsory process employed in fixing them. A guardian cannot contract with himself for the rent of his ward's real estate, or for the use of his ward's mill, nor resolve to compensate himself out of his ward's money for wrongs done him by his ward before he was put under guardianship. It would be immaterial whether or not he obtained the appointment of guardian for the purpose of making the contract or of obtaining the compensation. The fairness and justness of the contract, and of the resolution formed by him as guardian for his own benefit, would not be a ground on which the illegal contract and resolution could be maintained by the guardian against his ward.

The immediate government and direction of the affairs of the Concord Railroad are, by its charter, vested in a board of seven directors, to be chosen by the members of the corporation. In the exercise of the director's powers, the stockholders have no voice and no vote. They are as powerless as a ward in the hands of a guardian annually elected by himself. The law requires of a guardian self-denial, integrity, diligent attention, an eye single to the interest of his ward, and that he be above mercenary motives (*Sparhawk v. Allen*, 21 N. H. 9, 26),—qualities no less requisite in a director in the discharge of his duty. To whom shall the stockholders look with confidence that their interests will be protected but to their directors? And when the stockholders' interests are sacrificed, or threatened, they may have no other resort for adequate protection except to a court of chancery. This is a case where equity is called upon to interpose its aid in behalf of the stockholders: *March v. Eastern R. R. Co.*, 40 N. H. 548, 567; 77 Am. Dec. 732.

The question whether the contracts made by the defendants for rates over the lower roads are fair and just, and whether the upper companies have valid and legal claims against the Concord, cannot be litigated or contested with the upper companies by a board of Concord Railroad directors whose interests are opposed to those of the Concord, and are in harmony with those of the upper companies.

In the making of these contracts, and in the settlement of these claims, the stockholders of the Concord have the legal right to the services of directors whose interests are not hostile to their interests. A director or stockholder in the Northern or Boston, Concord, and Montreal company is not such a director. It may, for most purposes, be convenient and desir-

able that the same person or persons should act as directors of two or more roads forming parts of a continuous line. For many purposes their interests are not adverse. The harmonious working of the several parts, when a large portion of its business is the transportation of goods and passengers over the whole line, requires unity of purpose and management: *Burke v. Concord R. R.*, 61 N. H. 160, 233, 234. But however all this may be, the right of the stockholders of a single road, that it shall be operated primarily in their own interest, cannot be overridden or displaced by directors occupying inconsistent relations.

In England, Parliament has declared by statute (8 & 9 Vict., c. 16) that no person interested in any contract with a corporation shall be capable of being a director thereof, and if any director shall directly or indirectly be concerned in any contract with the corporation, his office shall become vacant. The office becomes vacant, although in a suit at law between the parties upon such a contract the contract is not held void: *Foster v. Oxford etc. Ry Co.*, 13 Com. B. 200. Such contracts are voidable in equity at the suit of a stockholder. We have no such statute; but reason and common sense, and all the analogies of the law, forbid that a person should act in a position of trust when self-interest conflicts with duty. The consciences of men in such positions will not stand the strain of self-interest. We approve the remarks of Welch, J., in *Goodin v. Cincinnati etc. Canal Co.*, 18 Ohio St. 169; 98 Am. Dec. 95: "A director whose personal interests are adverse to those of the corporation has no right to be or act as a director. As soon as he finds that he has personal interests which are in conflict with those of the company, he ought to resign. No matter if a majority of the stockholders as well as himself have personal interests in conflict with those of the company. He does not represent them as persons, or represent their personal interest. He represents them as stockholders, and their interests as such." *United States Rolling Stock Co. v. Atlantic etc. R. R.*, 34 Ohio St. 465, 32 Am. Rep. 380, was a stockholders' bill for an injunction. The plaintiff's board of five directors were members of the defendant's board of thirteen. The bill was dismissed because not seasonably brought; and the remarks of the court, to the effect that the agreement sought to be set aside was valid because executed by a majority of the board without the interested directors, would seem to be dicta. *Ashhurst's Appeal*, 60 Pa. St. 291, and *Watts's Appeal*,

78 Id. 370, are sometimes cited to the point that contracts or sales made by a board of directors with or to some of their number may be sustained in equity, and the remarks of the court are to the point that such contracts and sales may be upheld if their perfect fairness is shown. These cases were stockholders' bills to set aside sales of property, upon the ground of a violation of fiduciary duty. Relief was denied, upon the ground that the applications came too late.

Flagg v. Manhattan R'y Co., 20 Blatchf. 142, decides that where an agreement is made by the directors, relinquishing the right to a guaranty of dividends to a corporation by another corporation, the execution of the agreement will not be enjoined at the suit of a stockholder because three of the directors voting were also stockholders in the guarantor corporation, it appearing that, without counting their votes, a majority of the directors voted for the measure.

In *Butts v. Wood*, 38 Barb. 181, 37 N. Y. 317, the action of the majority of two in a board of three, passing upon the claim of a third director, who also voted, was set aside at the instance of one of the stockholders: See also *Wardens of St. James v. Rector etc. Church of the Redeemer*, 45 Barb. 356; *Kitchen v. St. Louis R. R.*, 69 Mo. 224; *Gilman etc. R. R. v. Kelly*, 77 Ill. 426; *Koehler v. Black etc. Iron Co.*, 2 Black, 720; *Morawetz on Corporations*, 245, and cases; 1 *Perry on Trusts*, sec. 207, and cases; *Pierce on Railroads*, 36-40, and cases; *Green's Brice on Ultra Vires*, 477, note a, and cases. Stockholders and creditors are entitled not only to the vote of a director in the board, but to his influence and argument in discussion: *Ogden v. Murray*, 39 N. Y. 202, 207; *Aberdeen R'y Co. v. Blaikie*, 1 Macq. 461, where the court said: "It was Mr. Blaikie's duty to give his co-directors, and through them to the company, the full benefit of all the knowledge and skill which he could bring to bear on the subject." In *Barnes v. Brown*, 80 N. Y. 527, 536, the court said: "If he [plaintiff] had attempted to perform the contract while he was director, the stockholders could probably have intervened by some suit in equity adapted to the nature of the case to nullify the contract as to him, or to restrain him as to the performance thereof, or to compel him to elect to resign his office of director, or to give up the contract."

Our conclusion upon this part of the case is, that the directors of the Concord could not make the contracts with the upper companies, nor settle the claims of those companies

against the Concord. For the transaction of that part of the business of their office, they were disabled by the understanding on which, the purpose for which, and the interest in and by which, they were elected.

The case finds that the Northern Railroad is the owner of 1,290 shares of Concord Railroad stock, purchased in 1873, upon which it has since voted at the meetings of the Concord Railroad. A corporation cannot become a stockholder in another corporation, unless such power is given it by its charter, or is necessarily implied in it (*Franklin Co. v. Lewiston Bank*, 68 Me. 43; 28 Am. Rep. 9; *Mechanics' etc. Bank v. Meriden Agency Co.*, 24 Conn. 159; Green's Brice on *Ultra Vires*, 91, and cases cited; Morawetz on Corporations, sec. 229, and cases cited); especially if the purchase be for the purpose of controlling or affecting the management of the other corporation: *Sumner v. Marcy*, 3 Wood. & M. 105; *Central R. R. Co. v. Collins*, 40 Ga. 582; *Hazlehurst v. Savannah etc. R. R. Co.*, 43 Id. 13; *Great Northern R'y Co. v. Eastern etc. R'y Co.*, 21 L. J. Ch. 837; *Booth v. Robinson*, 55 Md. 419, 439. Dealing in stocks is not expressly prohibited in the act of Congress providing for the organization of national banks (U. S. R. S., sec. 5136, subd. 7), but such prohibition is implied from the failure to grant the power: *First Nat. Bank v. National Exc. Bank*, 92 U. S. 122, 128. Corporations are creatures of the legislature, having no other powers than such as are given to them by their charters, or such as are incidental or necessary to carry into effect the purposes for which they were established: *Downing v. Mt. W. Road Co.*, 40 N. H. 230, 232; *Trustees v. Peaslee*, 15 Id. 317, 330; *Beaty v. Knowler's Lessee*, 4 Pet. 152; *Perrine v. Chesapeake etc. Co.*, 9 How. 172; *Bank of U. S. v. Earle*, 13 Pet. 519; *Trustees Dartmouth College v. Woodward*, 4 Wheat. 518, 636.

Certain classes of corporations, such as religious and charitable corporations, and corporations for literary purposes, may rightfully invest their moneys in the stock of other corporations. The power, if not expressly mentioned in their charters, is necessarily implied, for the preservation of the funds with which such institutions are endowed, and to render their funds productive. So an insurance company or savings bank may rightfully invest its capital or deposits in the stocks of railroad companies, banks, manufacturing companies, and similar corporations. The power is necessary to enable them to engage in the business for which they are organized, and

hence is implied, if not expressly granted, in their charters. Such investments are in the line of their business. On the other hand, a manufacturing or railroad corporation is incorporated to do the business of manufacturing, or transporting passengers and merchandise. Investing their funds in that of other corporations is not in the line of their business. Under extraordinary circumstances it may become necessary for a national bank, or a manufacturing corporation, or a railroad corporation, to acquire stock in another corporation, as in satisfaction of a valid debt or by way of security, but with a view to its subsequent sale or conversion into money so as to make good or redeem an anticipated loss: *First Nat. Bank v. Nat. Ex. Bank*, 92 U. S. 128; *Fleckner v. Bank of U. S.*, 8 Wheat. 351.

In *Hodges v. N. E. Screw Co.*, 1 R. I. 312, 53 Am. Dec. 624, the court said there was no doubt the defendant company might have taken the stock in the iron company in payment for its rolling-mill, if it had been taken with a view to sell again, and not permanently to hold it.

The Northern Railroad by its charter was vested with all the powers necessary to carry into effect the purposes and objects of its incorporation, subject to the laws in relation to corporations and railroads contained in the Revised Statutes. The objects of its incorporation are declared to be the accommodation of the public travel, and the transportation of goods and merchandise: Laws 1844, c. 190. It was not contemplated that more funds would be raised by the issue of stock than was necessary to construct and equip its road. The provision that when the net receipts shall amount to a sum making, with the prior net receipts of the corporation, more than an average of ten per cent per annum from the commencement of its operations, the excess shall be paid into the treasury of the state, is evidence that the legislature never contemplated the accumulation of a fund from its earnings, or from loans, or from the issue of stock, to be invested in the stock of another railroad corporation. It can no more make a permanent investment of funds in the stock of another road than it can engage in a general banking, manufacturing, or steamboat business. It is neither incidental to the purposes of its incorporation, nor necessary in the exercise of the powers conferred by its charter. If it can purchase any portion of the capital stock of the Concord company, it may buy up the whole, and thus engage in a business for which its charter gives it no authority. And what would hinder a banking corporation from

becoming a manufacturing company, or a manufacturing company from becoming a railroad common carrier?

But the facts in this case go further. The stock was bought at \$105 or \$106 per share (par value \$50), a price largely in excess of its market value, and for the purpose of obtaining control of the Concord, and securing more favorable contracts to itself. In *Sumner v. Marcy*, 3 Wood. & M. 105, the corporation was chartered to deal in lumber, with a capital of one hundred and fifty thousand dollars, of which only seventy-five thousand dollars could be invested in personal property, and took stock in a bank to the value of one hundred and sixty-eight thousand dollars, for the purpose of getting control of the bank,—a clear violation of its charter, but no more so than in this case. The purchase by a corporation of stock in another corporation will be enjoined at the instance of stockholders, when it involves a misapplication of corporate funds, or is a mere speculation, or is induced by a vicious purpose: *Pierce on Railroads*, 505. If the investment by one railroad corporation of more than one hundred and thirty-five thousand dollars in the stock of another at prices exceeding its market value, for the purpose of controlling such corporation for its own benefit, is not a misapplication of corporate funds, it would be difficult to find a case where such investment would be.

The law does not suffer a trust to fail for want of a trustee. This principle applies as well when, without legal remedy, the fiduciary failure would be partial as when it would be total. In this case the failure would be partial. The trustees, namely, the directors of the Concord company, are disabled to perform their official duty of managing the trust fund, namely, the property and business interests of that company, only so far as the dealings between that and the upper companies are concerned. The plaintiff has not shown that the trustees are incompetent to manage the other affairs of the trust, or that there is danger of the other affairs being mismanaged. His protection should be commensurate with the fiduciary disability and the danger shown to exist.

For the legal incapacity of the trustees to deal with the upper companies the plaintiff is entitled to a complete remedy that will prevent a partial failure of the trust. This requires not a removal of the trustees (directors), but the provisional appointment of a trustee (one or more) for the performance of that part of the duty of the present directors which they are

legally incapacitated to perform. The court will appoint a trustee to manage those affairs of the Concord which are subjects of controversy in this suit, and which the directors of the Concord are held by this decision to be legally disabled to manage. And an injunction is granted against the execution by the directors of the vote to pay sums of money to the upper companies upon claims made by those companies against the Concord company. It will be the duty of the trustee appointed under this decision to manage the trust so far as it involves dealings with the upper companies in relation to those claims and all other claims between those companies and the Concord, in relation to terms of connection and transportation, past, present, and future.

The roads must be run upon some terms of connection and transportation; and the existing terms will be allowed to continue until they are terminated by the trustee now to be appointed, or in some other legal manner. To the control and management of such trustee, the interests of the Concord company in that behalf are transferred.

The selection of a trustee remains to be made. If the parties agree on a suitable person for that position, they can report the same for consideration. As the trustee will have possession of no property, a fiduciary bond will not be required.

It may be necessary to go further than this decision goes; but such necessity does not now appear. If the remedy now given is found by experience, or, on further consideration, to be inadequate, it will be supplemented by such action as the case requires.

Decree accordingly.

CORPORATIONS. — THE DIRECTORS OF A CORPORATION ARE TRUSTEES for the corporation, and hold a fiduciary relation to it: *Sweeney v. Grape Sugar Co.*, 30 W. Va. 443; 8 Am. St. Rep. 89, and note; *Boone on Corporations*, secs. 139, 256; *Farmers' Bank v. Downey*, 53 Cal. 446; 31 Am. Rep. 62; *Simons v. Vulcan Oil etc. Co.*, 61 Pa. St. 202; 100 Am. Dec. 628; *Hoffman etc. Co. v. Cumberland etc. Co.*, 16 Md. 456; 77 Am. Dec. 311; *Philadelphia etc. R. R. v. Cowell*, 28 Pa. St. 329; 70 Am. Dec. 128; *Bank of M. R. v. Hill*, 56 Me. 285; 96 Am. Dec. 470. But a person who signs his name to the charter of a contemplated railroad company does not by that fact assume a fiduciary capacity towards such projected corporation: *St. Louis etc. R. R. Co. v. Tiersan*, 37 Kan. 606.

DIRECTORS INTERESTED. — When one or more directors are interested in the passage of a resolution, they are disqualified from voting thereon: *Smith v. Los Angeles etc. Ass'n*, 78 Cal. 299; 12 Am. St. Rep. 53, and note.

CORPORATIONS. — Directors of two corporations cannot act for either when the interests of the two corporations are conflicting: *Lawson's Rights and Remedies*, sec. 412; *Morawetz on Corporations*, sec. 228.

TRUSTS WILL NOT BE PERMITTED TO FAIL through a failure or disability of the trustee to execute the trust: *Seda v. Huble*, 75 Iowa, 429; 9 Am. St. Rep. 496, and note.

CROSS v. GRANT.

[62 NEW HAMPSHIRE, 675.]

JURY AND JURORS — VERDICT. — WHEN VERDICT IS RETURNED, JURY MAY BE ASKED upon which count it was rendered; and if the foreman answers in the presence and hearing of the whole panel, their assent to his answer is presumed, if no juror dissents.

CRIMINAL CONVERSATION. — GIST OF ACTION FOR CRIMINAL CONVERSATION is the loss of the comfort and society of the wife. The husband must prove that some right of his own in the person or conduct of his wife has been violated.

CRIMINAL CONVERSATION. — NEW HAMPSHIRE GENERAL LAWS, CHAPTER 183, REGULATING PROPERTY RIGHTS OF MARRIED WOMEN, has not repealed the common law giving to the husband an action for criminal conversation for the adultery of his wife.

CRIMINAL CONVERSATION. — MISCONDUCT, NEGLECT, OR INFIDELITY OF HUSBAND CANNOT BE SET UP as a defense for the infidelity of the wife in an action for criminal conversation. But evidence of the husband's ill-treatment of his wife is admissible in mitigation of damages.

CRIMINAL CONVERSATION — EVIDENCE. — IN ACTION FOR CRIMINAL CONVERSATION, LETTER WRITTEN BY DEFENDANT IS ADMISSIBLE, where, unexplained, it tended to show that the defendant resorted to indirect means to procure the attendance of the plaintiff's wife at the town where he resided.

EVIDENCE. — QUESTION WHETHER EVIDENCE SHOULD BE EXCLUDED as being too remote is one of fact properly determined at the trial.

PRACTICE. — IT IS ERROR TO PERMIT COUNSEL, IN ARGUING BEFORE JURY, TO STATE and comment upon facts not in evidence, against the objection of the opposite party, and the error is not corrected by an instruction to the jury to disregard all statements of counsel not supported by evidence, unless it is found as a fact that the error was harmless, and that the legal right to a fair trial was not infringed.

ACTION for criminal conversation with the plaintiff's wife, the second count of the declaration charging the defendant with enticing, persuading, and inducing her to abandon him. The defendant was a physician, and resided at Lancaster, and the plaintiff's wife resided at Stewartstown. She was an invalid, and was under the defendant's treatment from July, 1878, up to the time of the trial. He sometimes treated her at Lancaster, and on several occasions visited her at Stewartstown; and he claimed that her visits to the former place, and

his at the latter, were necessary for proper medical treatment, while the plaintiff claimed the contrary. Upon the return of a verdict for the plaintiff, the court inquired of the foreman of the jury upon which count the verdict was founded, and he answered in the presence and hearing of the other jurors, that they found upon the first count, and did not consider the second. No juror dissented from such answer. The defendant excepted to the inquiry and the answer. Other grounds of exception sufficiently appear in the opinion.

Bingham, Mitchells, and Batchellor, Ladd and Fletcher, and Parsons and Johnson, for the defendant.

Bingham, Aldrich, and Remich, Ray, Drew, and Jordan, and W. H. Shurtleff, for the plaintiff.

SMITH, J. 1. When the verdict was returned, and the foreman in the presence and hearing of the other jurors was asked upon which count the verdict was rendered, no juror dissented from his answer. The inference of assent from their omission of any expression of dissent is conclusive. The practice in this instance is not unusual: *South Hampton v. Fowler*, 54 N. H. 197, 201. So far from being objectionable, it is frequently a convenient one, if not quite indispensable.

2. The defendant's requests for instructions and exceptions to the instructions given must stand, if sound, upon the proposition that recent legislation in this state, placing married women in regard to their property upon an equality with unmarried women, has repealed the common law giving to the husband an action for criminal conversation for the adultery of his wife. His argument is, that at common law the husband had absolute control over his wife's person, property, and services, and the exclusive right to her earnings; that when she is abducted or commits adultery, he is injured in his property interests, because the injury is accompanied by the loss of her services; and that the action of criminal conversation stands like the action by a parent for the seduction of his daughter,—in other words, that loss of services is the gist of the action, and being no longer entitled to the services of his wife, he can no longer maintain the action. The maxim, when the reason of a law ceases, so does the law itself, is invoked in aid of this position.

The exceptions do not call for any decision of the question what services the wife is entitled, under General Laws, chap-

ter 183, section 1, to perform upon her own account and at her own option, nor for what services she is entitled to earnings or compensation. There are cases which hold, under statutes similar to our own, that the earnings which a married woman is entitled to hold to her own exclusive use are her wages for services or labor performed for others than her husband, or the proceeds of business carried on by herself, such as dress-making, millinery business, school-teaching, and the like, and that her husband is entitled to her labor and assistance in the discharge of those duties and obligations which arise out of the marriage relation, without compensation: *Musselman v. Galligher*, 32 Iowa, 383; *Grant v. Green*, 41 Id. 88; *Peters v. Peters*, 42 Id. 182; *Mewhirter v. Hatten*, 42 Id. 288; 20 Am. Rep. 618; *Wood v. Mathews*, 47 Iowa, 410; *Brooks v. Schwerin*, 54 N. Y. 343; *Filer v. New York Cent. R. R.*, 49 Id. 56; 10 Am. Rep. 327; *Reynolds v. Robinson*, 64 N. Y. 589; *Fry v. Drestler*, 2 Yeates, 278; *Bigaouette v. Paulet*, 134 Mass. 123; 45 Am. Rep. 307; *Ogborn v. Francis*, 44 N. J. L. 441; 43 Am. Rep. 394; 1 Chitty's Pleading, 134, 167; Abbott on Trial Evidence, 405. But we leave this question to be decided when it shall arise.

The fault with the defendant's logic is in assuming that the gist of the action for criminal conversation is the loss of services. Neither of the two cases cited by him in support of this claim is in point. In the first, *Weedon v. Timbrell*, 5 Term Rep. 357, Ashurst, J., said: "The gist of this action is the loss of the comfort and society of the plaintiff's wife; that is always inserted in declarations of this kind as a material and substantial allegation, and the forms of pleading are evidence of the law." Both he and Lord Kenyon, C. J., are understood to have meant in their opinions that loss of comfort and society must be proved. They said that the principle of the case is like that of an action by a parent for the seduction of his daughter, where slight proof of acts of service done is all that is required to support the allegation in the declaration. In fact, the actual loss sustained by a parent through the diminished ability of his daughter to render personal service, and the servile position of the daughter, are ordinarily scarcely more than mere fictions by which the jury is enabled to render substantial justice: *Davidson v. Goodall*, 18 N. H. 423.

The other case cited by the defendant, *Lynch v. Knight*, 9 H. L. Cas. 577, was an action by the wife for slander, in which her husband was joined, the special damage alleged being

that the words uttered by the defendant imputed to her unchastity, in consequence of which her husband refused to live with her, whereby she lost the comfort, society, and support of her husband. Lord Wensleydale said: "The assistance of the wife, in the conduct of the household of the husband and in the education of his children, resembles the service of a hired domestic, tutor, or governess,—is of material value, capable of being estimated in money; and the loss of it may form the proper subject of an action, the amount of compensation varying with the position in society of the parties. . . . It is to the protection of such material interests that the law attends. . . . For these reasons I think the wife has no remedy in the supposed case of the wrongful imprisonment of the husband; and by parity of reasoning she can have none for being deprived of the society of her husband by the slander of another upon her character, causing him to desert her." If these remarks are relevant in an action by the husband for criminal conversation, they are opposed to the remarks of Lord Campbell in the same case, who said: "The wife is not the servant of the husband, and the action for criminal conversation by the husband does not, like the action by a father for seduction of a daughter, rest on any such fiction as a loss of the services of the wife."

The action for criminal conversation is not given to the husband for an injury to the wife only. He must prove that some right of his own in the person or conduct of his wife has been violated: *Bigaouette v. Paulet*, *supra*. The text-books and decisions declare that the gist of the action is the loss of the comfort and society of the wife: 3 Bla. Com. 139; 2 Chitty's Pleadings, 314; *Yundt v. Hartrunft*, 41 Ill. 12; *Wilton v. Webster*, 7 Car. & P. 198; 2 Hilliard on Torts, 592; *Rigaut v. Gallisard*, 7 Mod. 82; Bull. N. P. 27; Wood's Mayne on Damages, 665; *Weedon v. Timbrell*, 5 Term Rep. 360; Abbott on Trial Evidence, 685; *Chambers v. Caulfield*, 6 East, 244; *Wood v. Mathews*, 47 Iowa, 409; *Egbert v. Greenwalt*, 44 Mich. 245; 38 Am. Rep. 360; *Sanborn v. Neilson*, 4 N. H. 501, 503; *Bromley v. Wallace*, 4 Esp. 237, where Lord Alvanley said the injury to the husband is "the keenest of all injuries." And see authorities *passim*. In *Bigaouette v. Paulet*, *supra*, Mr. Justice Allen said: "A husband is not master of his wife, and can maintain no action for the loss of her services as his servant. His interest is expressed by the word *consortium*; the right to the conjugal fellowship of the wife, to her com-

pany, co-operation, and aid in every conjugal relation. . . . The loss of the *consortium* is presumed, although the wife may have herself been the seducer, or may not have been living with her husband. A husband who is living apart from his wife, if he has not renounced his marital rights, can maintain the action, and it is not necessary for him to prove alienation of the wife's affection, or actual loss of her society or assistance. . . . The essential injury to the husband consists in the defilement of the marriage bed, in the invasion of his exclusive right to marital intercourse with his wife, and to beget his own children. This presumes the loss of the *consortium* with his wife, of comfort in her society in that respect in which his right is peculiar and exclusive."

On the question of validity, the law regards marriage as a civil contract requiring no ecclesiastical sanction: *Londonderry v. Chester*, 2 N. H. 268, 278; 9 Am. Dec. 61; Bracton, b. 1, c. 5; Plow. 445; Mir. Jus. 104; 1 Bla. Com. 433. But it is something more than an ordinary contract: Smith (N. H.), 527; *Adams v. Palmer*, 51 Me. 481, 483; *Maguire v. Maguire*, 7 Dana, 181, 183; *Ditson v. Ditson*, 4 R. I. 87, 101; *Wade v. Kalbfleisch*, 58 N. Y. 282, 284; 17 Am. Rep. 250. It is an institution of society having its foundation in civil contract (1 Bishop on Marriage and Divorce, secs. 2, 3), and having certain duties and obligations devolved upon the parties, derived from the law. Other contracts may be modified or released upon consent of parties. Marriage is a social relation, like that of parent and child. It cannot be dissolved by the parties when entered into. "The union is or should be for life. It is equally so in reason, in the common sentiments of mankind, and in the teachings of religion": 1 Bishop on Marriage and Divorce, sec. 21. "It has its foundation in nature, and is the only lawful relation by which Providence has permitted the continuance of the race": 2 Kent's Com. 75. The public is deeply interested in preserving the institution in its purity. Hence it is "regulated and controlled by public authority, upon principles of public policy, and for the benefit of the community": *Wade v. Kalbfleisch*, *supra*.

The marriage contract or marriage duties are violated by adultery of one of the parties, and the other party in the adultery is such a party in the violation of the contract or duty that he should be liable in damages. It is not to be presumed that the legislature intended to abolish the right or remedy on that subject, in regulating the property rights of

the wife, especially in the absence of any language expressing such interest, or from which it can fairly be inferred. By placing married women in regard to their property and earnings upon an equality with unmarried women, the law has modified the rights and liabilities of husbands in some material respects: *Harris v. Webster*, 58 N. H. 481, 484. But the incidental changes of conjugal rights and duties are such only as are reasonably and necessarily implied. The adultery of the wife alike alienates her affections from her husband, exposes him to shame and ridicule and the hazard of maintaining spurious issue, whether she is invested by law with the exclusive control and use of her own property and earnings or whether she is under the common-law disabilities, as to property, of married women. Nor is the degradation of the wife from her adultery any the less sure, or the mental suffering of her husband any the less keen, in the one case than in the other.

3. The other question raised by the instructions given and by those refused is, whether the ill-treatment by the plaintiff of his wife can be set up as an answer to the action, or whether it goes in mitigation of damages only. Upon this question the authorities are not unanimous, but the great weight of authority is, that such evidence goes in mitigation of damages. *Weedon v. Timbrell*, 5 Term Rep. 357, is an authority the other way, but the soundness of that case was questioned in *Chambers v. Caulfield*, 6 East, 244; and see Hilliard on Torts, 1st ed., 594. *Wyndham v. Wycombe*, 4 Esp. 16, and *Sturt v. Marquis of Blandford*, cited in the same case, deny the right of the husband who is guilty of adultery to maintain the action. There may be other English cases to which our attention has not been called. *Patterson v. McGregor*, 28 U. C. Q. B. 280, is the only American case, so far as we have discovered, that follows *Weedon v. Timbrell*, *supra*.

The husband cannot recover if he has been a party to his own dishonor, or has permanently and totally given up all advantage to be gained from the society of his wife, or has condoned the adultery: Moak's Underhill on Torts, 328, and cases cited. But otherwise, the rule as established by the authorities generally seems to be, that the misconduct, neglect, or infidelity of the husband cannot be set up as a defense for the infidelity of the wife in an action for criminal conversation: *Sanborn v. Nielson*, 4 N. H. 501; *Bromley v. Wallace*, 4 Esp. 237; *Winter v. Henn*, 4 Car. & P. 494; *Calcraft v. Earl of*

Harborough, 4 Id. 499; Broom's Legal Maxims, 268, 260, and cases cited; Abbott on Trial Evidence, 686, and cases cited; *Bigaouette v. Paulet*, 134 Mass. 123; 45 Am. Rep. 307; *Palmer v. Crook*, 7 Gray, 418; 2 Hilliard on Torts, 594; *Lowe v. Massey*, 62 Ill. 47; *Smith v. Masten*, 15 Wend. 270; *Harter v. Crill*, 33 Barb. 283; *Coleman v. White*, 43 Ind. 429; *Hutchins v. Kimmell*, 31 Mich. 126; 18 Am. Rep. 164; *Dance v. McBride*, 43 Iowa, 624; *Bunnell v. Greathead*, 49 Barb. 106; *Shattuck v. Hammond*, 46 Vt. 466; 14 Am. Rep. 681; *Rea v. Tucker*, 51 Ill. 110; 99 Am. Dec. 539; 2 Addison on Torts, 1084-1086; Bigelow's Leading Cases in Torts, 328. The reason of the rule is, that "any unhappy relations existing between the plaintiff and wife, not caused by the conduct of the defendant, may affect the question of damages; . . . but they are in no sense a justification . . . of the defendant's conduct. They are not allowed to affect the damages because the acts of the defendant are less reprehensible, but because the condition of the husband is such that the injury which such acts occasion is less than otherwise it might have been": *Hadley v. Heywood*, 121 Mass. 236, 239.

If the husband, by his conduct, compels the separation from him of his wife, he may, as to her, have lost his legal right to the solace and comfort of her society, but not as to all the world. His consent is not thereby extended to other men for sexual commerce with her. Although separated from her husband, and by his fault, she remains his wife until divorced, and for her support he is liable. Her enforced separation does not release him from his marital duties. There is always the hope of reconciliation. The proper nurture, training, and instruction of children require the united labor and affection of both parents. Their mutual comfort and support, and the good of society, require that they should live together in one family. The policy of the law encourages them, if living apart, to come together again. Reconciliation would or should be followed by purity in their marriage relation, and happiness in their home. If, while separated, she is debauched, the hope of reconciliation is thereby greatly diminished, and may be wholly extinguished.

4. The letter to Knapp was written for a proper or improper purpose. It was for the jury to say, upon all the evidence upon that point, whether the purpose was, or was not, innocent. The letter tended to show that the defendant resorted to indirect means to procure the attendance of Mrs.

Cross at Lancaster, and, unexplained, that his purpose was an improper one.

5. It does not appear what the contents of the letters to Mrs. Paul were, and, if material, their relevancy may have been so remote that we cannot say, as matter of law, that the court was not justified in finding, as a matter of fact, that the evidence should be excluded: *Watson v. Twombly*, 60 N. H. 491, 493.

6, 7, 8. These exceptions relate to the conduct of counsel for the plaintiff, in his closing argument to the jury. It is unnecessary to repeat what was said upon this subject in *Tucker v. Henniker*, 41 N. H. 317, and in *Hilliard v. Beattie*, 59 Id. 462. The remarks made in those cases apply with full force in this case. Each party had a moral and legal right to a fair trial upon legal evidence. The court had no authority to permit that right to be violated by the unsworn and incompetent statements of counsel. The wrong done the defendant is not rectified by a presumption that it was done in the excitement of the trial, without deliberation, and without a wrongful purpose. An intent to abstain from an infringement of his right of a fair trial does not alter the fact that the trial was unfair. The instruction given the jury to disregard all statements of counsel that were not supported by evidence falls far short of what the law requires for correcting the error, and it is not found as a fact that the error was harmless.

9. Other exceptions taken at the trial relate principally to the admission or exclusion of evidence. The principles involved are so well settled that no special mention of them is required.

All the exceptions are overruled, except those numbered 6, 7, and 8, which, for reasons given, are sustained.

New trial granted.

CRIMINAL CONVERSATION. — An action will lie for criminal conversation, although the intercourse was against the wife's consent, and caused no actual damages by reason of loss of her service to the husband: *Bigauette v. Paulet*, 134 Mass. 123; 45 Am. Rep. 307. So a husband may maintain an action, although the intercourse took place after his final separation from his wife, and after a divorce for his cruelty: *Michael v. Dunkle*, 84 Ind. 544; 43 Am. Rep. 100; but see *Gleason v. Knapp*, 56 Mich. 291; 56 Am. Rep. 388.

CRIMINAL CONVERSATION — DAMAGES — EVIDENCE. — Evidence of want of affection for the wife, or a failure to support her, will not be admitted in an action by the husband for criminal conversation: *Dallas v. Sellers*, 17 Ind. 479; 79 Am. Dec. 489. Suffering wife to live as a prostitute, or conniving in her adultery, may be shown in an action of this nature: *Cook v. Wood*, 30 Ga. 891. So defendant in such an action may prove plaintiff's criminal inter-

course with other women: *Shattuck v. Hammond*, 46 Vt. 466; 14 Am. Rep. 631. The pecuniary condition of the parties at the time of the commission of the offense may be shown: *Peters v. Lake*, 66 Ill. 206; 16 Am. Dec. 593, and note 596. So evidence that the wife sought after, importuned, and threw herself in defendant's way, is admissible in an action for criminal conversation, in order to mitigate the damages; and under such circumstances the jury cannot consider the "injury to the happiness, reputation, and honor of the plaintiff's family": *Ferguson v. Smethers*, 70 Ind. 519; 36 Am. Rep. 186.

MISCONDUCT OF COUNSEL IN ARGUMENT, WHEN SO SERIOUSLY IMPROPER AS TO CALL FOR REVERSAL OF JUDGMENT: See extended note to *McDonald v. People*, 9 Am. St. Rep. 559-570.

CASES
IN THE
SUPREME COURT
OF
SOUTH CAROLINA.

STATE v. SYPHRETT.

[27 SOUTH CAROLINA, 29.]

LIBEL — PROVINCE OF JURY — CONSTITUTIONAL LAW. — Notwithstanding the provision of the constitution of South Carolina "that in all indictments for libel the jury shall be the judges of the law and the facts," the law defining libel remains as before. The principal result of this provision is simply to secure to the jury, by fundamental law, the right to render a general verdict, under an indictment for libel, as in other cases. It is therefore the duty of the presiding judge, upon the trial of an indictment for libel, to declare to the jury the law applicable thereto; and if he errs in so doing, such error may be reviewed on appeal as in other cases, unless the defendant is acquitted, in which case he cannot again be put upon his trial.

MOTION IN ARREST OF JUDGMENT MUST BE BASED UPON SOME DEFECT APPEARING UPON THE RECORD, and cannot be sustained merely upon the ground that the allegations of the indictment are not supported by the proof. Where the indictment could have been sustained under proof, there is no ground for arrest of judgment.

INDICTMENT FOR LIBEL WHEN THERE HAS BEEN NO PUBLICATION, EXCEPT TO THE PARTY LIBELED, must aver that the paper was written or sent with the intent to provoke a breach of the peace.

LIBEL. — THERE IS NO PUBLICATION OF A LIBEL WHERE IT CONSISTS OF A SEALED LETTER SENT TO THE PERSON UPON WHOM IT REFLECTS, AND HE, BECAUSE OF HIS INABILITY TO READ, HAS IT READ TO HIM BY HIS WIFE, THERE BEING NO EVIDENCE THAT THIS INABILITY TO READ WAS KNOWN TO THE PERSON WHO SENT SUCH LIBEL, NOR ANY AVERTMENT THAT IT WAS SENT FOR THE PURPOSE OF PROVOKING A BREACH OF THE PEACE.

Islar and Glasse, for the appellant.

Jervoy, contra.

McIVER, J. The appellant, having been convicted of libel, appeals to this court upon the several grounds set out in the record, which will hereinafter be more particularly stated. The alleged libel was in the form of a letter from the defendant to the prosecutor containing a charge of larceny. It was sealed when delivered to the prosecutor, and the only evidence tending to prove a publication was, that the prosecutor, not being able to read, asked his wife to read it to him, and several days afterwards that prosecutor, in the presence of others, asked the defendant if he had written such a letter, and he admitted that he had. There was no allegation or evidence that defendant knew that prosecutor was unable to read, and the indictment contained no allegation that the defendant sent the letter to the prosecutor with the intent to provoke a breach of the peace.

Judge Kershaw, in his charge to the jury, while fully recognizing the right of the jury, under an indictment for libel, to be the judges of the law as well as the facts, said that he did not think that this relieved him from the duty of giving to the jury his views of the law of libel. After defining the offense charged, and explaining to the jury the several questions which they would be called upon to determine as to the question of publication, he charged the jury substantially as follows: That while it was true, as claimed by the counsel for defendant, that to write a libelous letter, seal it up, and send it to the party libeled, would not constitute the offense charged, unless the indictment contained an allegation that the letter was sent with the intent to provoke a breach of the peace, yet as there was evidence in this case tending to show that the letter was addressed to a person who could not read, and who could not therefore know the contents of the letter without calling in the aid of some one else, if the jury believed that the letter was given to the wife by the prosecutor to be read because of the necessity arising from his being unable to read, that would be such a publication as would dispense with the necessity for the allegation in the indictment that the letter was sent with the intent to provoke a breach of the peace.

The defendant's motion in arrest of judgment having been overruled, and sentence passed, the defendant appeals upon the following grounds: —

"1. Because his honor erred in overruling the motion of the defendant in arrest of judgment, made on the following grounds: 1. Because the proof being that the letter was de-

livered sealed to the prosecutor, the person libeled, the indictment is defective on its face, there being no averment therein that the defendant intended thereby to provoke and incite the prosecutor to a breach of the peace; 2. Because the proof of publication was insufficient to sustain the averments of the indictment, which alleged a publication generally, and not a publication with intent to provoke and excite the prosecutor to a breach of the peace; 3. Because the proof being that the letter was delivered sealed to the prosecutor, and by him taken to his house, and there read to him by his wife at this request, he being unable to read, a fact not proved to have been known by the defendant, was not such a publication, no other person being present, as is sufficient to support the indictment herein or to sustain a conviction thereunder. Such publication must be alleged to have been sent with intent to provoke the prosecutor to a breach of the peace.

"2. Because his honor erred in charging the jury as to the law of libel, the jury being the judges of both 'the law and the facts,' under article 1, section 8, of the constitution of this state.

"3. Because his honor erred in holding that, under the evidence in this case, the indictment was good, notwithstanding it did not contain the averment that the defendant intended by sending the libel to the prosecutor to provoke and incite him to a breach of the peace.

"4. Because his honor erred in charging the jury that notwithstanding the letter was delivered sealed to the prosecutor, and was only read to him by his wife at his request, no other person being present, he being unable to read, that this was a sufficient publication thereof to sustain the averments of the indictment and a conviction thereunder.

"5. Because his honor erred in holding that, under the evidence in this case, there was a sufficient publication of the libel to sustain the averments in the indictment, there being no evidence to show that the defendant knew, at the time the letter was delivered to the prosecutor, that he could not read.

"6. Because his honor erred in not leaving it entirely to the jury (the jury being the judges of the law and the facts) to say whether the defendant intended to injure the reputation of the prosecutor with the world at large, who knew nothing of the libel, the publication being confined to the prosecutor and his wife."

Before proceeding to a consideration of the several points

made by the grounds of appeal, it will be necessary, first, to dispose of a preliminary objection raised by the solicitor as to the jurisdiction of this court to hear and decide this appeal. This objection is based upon a provision in section 8, article 1, of the constitution, declaring that "in all indictments for libel, the jury shall be the judges of the law and the facts." By this provision, the solicitor contends—to use his own language—"the jury was put beyond the direction and control, although entitled to the advice, of the court. It was equivalent to repealing and wiping out all general and uniform law in this state as to libel. There is now a special law for each case, and each jury enacts that law. What writings are libelous; what is sufficient publication; what intent or motive must be shown to constitute the offense,—are all as much questions for the jury, and exclusively for the jury, as are the facts of the case, and there can therefore be no appeal from their finding."

If such a construction can be properly placed upon this provision of the constitution, then, indeed, it furnishes a sad commentary on the utter insufficiency of human language to express the intentions of those who used it; nay, more, of its capacity to be perverted by construction so as to effect precisely the opposite result from that which was intended. The slightest examination of the history of the controversy which led to the adoption of this or similar provisions will show that the sole purpose was to preserve the liberty of the press by protecting those charged with the abuse of such liberty, in the publication of alleged libels, from arbitrary power. Such being the object, it might be quite as dangerous to the liberty of the citizen to subject him to the arbitrary power of the jury as it would have been to leave him to the arbitrary power of the court. Indeed, it would be difficult to conceive of a more odious system of judicature than that by which a man would be tried by a law of which he was not merely ignorant, but of which he could not possibly inform himself, inasmuch as it would be locked up in the breasts of his triers until the verdict was rendered.

We cannot, therefore, assent to the proposition that the effect of the provision of the constitution under consideration "was equivalent to repealing and wiping out all general and uniform law in this state as to libel," and that "there is now a special law for each case, and each jury enacts that law." The only authority cited in support of such a proposition is an unsupported *dictum* of Willard, J., in *State v. Bailey*, 1 S. C. 6,

where he says that the object of such a constitutional provision is "to commit the rights of parties to the dictates of natural law that resides in the breast of the citizen, rather than to the deductions of formal and scientific law as administered by the courts." Such a view cannot command our assent. On the contrary, we agree with that eminent author, Dr. Wharton, who concludes an interesting discussion of the right of a jury to determine the law, with this striking and appropriate language: "Subject to the qualification that all acquittals are final, the law in criminal cases is to be determined by the court. In this way we have our liberties and rights determined, not by an irresponsible, but by a responsible, tribunal; not by a tribunal ignorant of the law, but by a tribunal trained to and disciplined by the law; not by an irreversible, but by a reversible, tribunal; not by a tribunal which makes its own law, but by a tribunal that obeys the law as made. In this way we maintain two fundamental maxims. The first is, that while to facts answer juries, to the law answers the court. The second, which is still more important, is, *Nullum crimen, nulla poena, sine lege*. Unless there be a violation of law preannounced, and this by a constant and responsible tribunal, there is no crime, and can be no punishment": 5 South. Law Review, 366, August-September, 1879.

It seems to us, therefore, that, under a proper construction of the clause of the constitution now under consideration, the practical result is simply to secure to the jury, by the fundamental law, the right to render a general verdict under an indictment for libel, as in other cases; and this, because such right had not only been questioned, but absolutely denied and refused by the courts in England. It was therefore quite natural that such right, deemed so important to the liberty of the citizen, should be placed beyond further question by an express provision of the organic law. Under this view all the protection designated to secure the liberty of the citizen is obtained, for after a general verdict of acquittal no new trial can be had (*State v. Gathers*, 15 S. C. 370), and at the same time not only the anomaly, but the gross injustice, of trying a man by a special law enacted for his case by the jury who are called upon to try him is avoided; and, on the contrary, he is tried by the established law of the land, as declared by those intrusted with that duty, just as a person charged with any other offense.

From this it follows that it is not only the right, but the

duty, of the presiding judge, upon the trial of indictments for libel, to declare to the jury the law applicable thereto, and if he errs in so doing, such errors may be reviewed on appeal, just as in any other case, unless the defendant is acquitted, when, under a well-settled principle of the common law, now incorporated in our constitution, "no person, after having once been acquitted by a jury, shall again for the same offense be put in jeopardy of his life or liberty": Constitution, art. 1, sec. 18.

We proceed, then, to inquire into the several grounds of appeal. And first, as to the motion in arrest of judgment. Such a motion must be based upon some defect apparent upon the record, and cannot be sustained simply upon the ground of variance between the *allegata* and *probata*. This is fully shown by the cases cited in the solicitor's argument: *State v. Creight*, 1 Brev. 169; 2 Am. Dec. 656; *State v. Heyward*, 2 Nott & McC. 312; 10 Am. Dec. 604; *State v. Graham*, 15 Rich. 310; *State v. Cockfield*, 15 Id. 316; *State v. Hamilton*, 17 S. C. 462. It will be observed that the several grounds upon which the motion in arrest of judgment is based all rest upon the allegation that the evidence was insufficient to sustain the charge as laid in the indictment, and not upon any defect in the indictment itself. They all assume that the charge as laid would have been unexceptionable, provided the evidence had been of a different character. In other words, they impliedly admit that an indictment for libel upon a private individual need not necessarily contain an allegation of the intent to provoke a breach of the peace, but that such an allegation and such proof is only necessary where there is no publication except to the person libeled; and inasmuch as there was no evidence in this case (as was contended by the appellant) of any publication by the defendant to any person except the prosecutor—the person alleged to have been libeled,—the indictment upon which the defendant has been convicted was insufficient, and the judgment should therefore be arrested.

This, however, is more an objection to the sufficiency of the evidence than to the sufficiency of the indictment. It is like the case of *State v. Graham*, *supra*, where, under an indictment for obstructing a public landing, and the proof being that the public road leading to the landing was obstructed at a point about one hundred yards from the landing, it was held that this constituted no ground for a motion in arrest of judgment, but was a good ground for a new trial. Or like the

case of *State v. Cockfield*, *supra*, where the indictment was for stealing a plow, and the evidence was that the article stolen was a plowshare, where a similar ruling was made. Or like the case of *State v. Hamilton*, *supra*, where the indictment charged the goods stolen to be the property of one person, when the proof showed them to be the property of another, it was held that while this might have furnished a good ground for a motion for a new trial, it afforded no ground for a motion in arrest of judgment. It will be observed that in all three of these cases the indictments were unexceptionable, and might have been sustained under a certain state of the evidence. And so here, under the assumption above alluded to, the indictment, under certain proof, could have been sustained, and hence there is no ground for arrest of judgment.

These remarks are based upon the assumption that an indictment for a libel upon a private individual which has been published abroad — to other persons than the one libeled — need not contain an allegation of any intent to provoke a breach of the peace, though we are inclined to think that this assumption, which we must admit seems to be supported by authority, is not well founded in reason. For when it is remembered that one of the essential elements in a libel of a private individual is its tendency to provoke a breach of the peace, and that the criminal law takes cognizance of it solely for that reason, and not for the purpose of protecting the good name and fame of private individuals (1 Bishop's Criminal Law, secs. 591, 734; 2 *Id.*, sec. 909), it would seem to follow logically that every indictment for a libel upon a private individual should contain an allegation of this essential element of the offense. But this is a question not made or argued in this case, and we do not propose to decide anything as to it.

The only contention on the part of the appellant is, that where there has been no publication abroad, as it is termed, — that is, to the public generally, — or to persons other than the one alleged to have been libeled, then it is necessary that the indictment should contain an allegation that the libel was sent to the party libeled with intent to provoke a breach of the peace. This position seems to be well supported by authority. In 3 Chitty's Criminal Law, 871, it is said: "Though there be no publication, yet the sending a letter to the party himself, filled with abusive language, is indictable, because it tends to provoke him to a breach of the peace in order to revenge the insult he has received; but then if there be no pub-

lication to a third person, the indictment must allege an intention to provoke the prosecutor to a breach of the peace"; citing *Rex v. Wegener*, 2 Stark. 245, which seems to be a leading case on the subject. And again, at page 875, this eminent author says: "Where there has been no publication of the libel to the third person, or the publication cannot be proved, and the libel has been sent to the prosecutor himself, it is necessary that the indictment should state that the paper was written or sent to the party libeled with the intent to provoke him to a breach of the peace." And in the form, given at page 889, for an indictment for writing and sending a letter to the prosecutor, accusing him of theft (precisely this case), we find the allegation of the intent to provoke the prosecutor to a breach of the peace.

It would seem, therefore, to be settled that where there has been no publication except to the person libeled, the indictment must contain an allegation that the libel was written or sent with intent to provoke a breach of the peace; and so the circuit judge instructed the jury in this case, but he added that if the letter was given to the wife by the prosecutor to be read by her, from the necessity arising from the prosecutor's being unable to read, simply with a view to inform himself of the contents of the letter, that would be a sufficient publication of the libel to a third person by the defendant to warrant his conviction under this indictment. This instruction on the part of the circuit judge as to the publication was excepted to by the defendant, and constitutes one of his grounds of appeal. In *Fonville v. McNease*, Dud. (S. C.) 303, 31 Am. Dec. 556, the testimony showed that the alleged libel was in the form of a letter, sealed and addressed to the prosecutor, or Miss Susan Sloan, which was dropped in an inclosure near plaintiff's house; that it came into the possession of the plaintiff with the seal unbroken, and that he opened it and read it aloud to his family and others. It also appeared, just as in this case, that the plaintiff, in a public place, in the presence of others, mentioned the fact of having received such a letter, stating the contents, and that defendant avowed himself the author of the letter. Upon a motion for nonsuit the court held that there was no *prima facie* evidence of publication by the defendant, and granted the motion.

It will be observed that the present case is identical with that just cited, except that there the plaintiff published the letter himself by reading it to the witness and his family,

while here it was read by the wife of the prosecutor, at his request, because of his inability to read. There the court said that the publication was the act of the plaintiff, and not of the defendant, and it seems to us that the same remark may be made here. True, here the prosecutor did not read the letter himself, but it was read by his request, and it was, therefore, as much his act as if he had himself read it. He, and not the defendant, caused the publication to be made. The fact that the prosecutor was unable to read, and must therefore necessarily call in the aid of some third person, in the absence of any testimony tending to show that the defendant knew of the prosecutor's inability to read, cannot affect the question. In this respect this case differs materially from the case of *Delacroix v. Thevenot*, 2 Stark. 63. There the defendant knew that the plaintiff's clerk was in the habit of opening and reading his letters, and hence when the defendant sent the libelous letter to the plaintiff, which was opened and read by the clerk, it was held to be sufficient proof of publication by the defendant, upon the well-settled principle that a man is presumed to intend the natural and probable consequences of his acts. That case, as O'Neill, J., says, in *Fonville v. McNease*, *supra*, constitutes an exception to the rule that sending a sealed letter containing libelous matter to the party himself is no evidence of publication, and the exception rests upon the knowledge of such facts as would induce a person to believe that the contents of the letter would reach a third person. But without such knowledge there is no foundation for the exception.

It seems to us, therefore, that, in the absence of any evidence whatever tending to show that the defendant knew of prosecutor's inability to read, it was error to instruct the jury that the giving of the letter by the prosecutor to his wife to read, because of his inability to do so, was such a publication as would render the defendant responsible under this indictment. It may be that the defendant, if he had known that the prosecutor could not read, and would therefore be compelled to call to his aid some third person in order to acquaint himself with the contents of the letter, would not have sent it. At all events, we do not think he can be held responsible for an act which he did not do, and which there is no reason to suppose he intended should be done; for one can scarcely be said to have intended the consequences of an act when he had no knowledge of such facts as would necessarily, or even probably,

lead to such consequences. The very fact that he employed a sealed letter as the vehicle of his charges against the prosecutor would seem to indicate that they were intended for his eye alone, and not for that of the public, as otherwise he might have used much more effectual means to effect his end.

It is quite true, as said by O'Neill, J., in *Fonville v. McNease*, *supra*, that there is a great distinction in respect to publication between an indictment and a civil action for libel, the object of the former being to prevent a breach of the peace, and hence a publication to the party himself is sufficient, while the object of the latter is to repair the damage done to a man's reputation, and hence a publication to third persons is necessary; yet, inasmuch as we have seen that this indictment, failing to contain any allegation of an intent to provoke a breach of the peace, can only be sustained by proof of publication to third persons, it becomes essential to inquire into the sufficiency of such publication, and hence the case of *Fonville v. McNease*, *supra*, though a civil action, becomes authority in this case. It seems to us that the circuit judge erred in his instructions to the jury as to what would be a sufficient publication of the alleged libel, under this indictment, and that upon this ground the case must go back.

The judgment of this court is, that the judgment of the circuit court be reversed, and that the case be remanded to that court for a new trial.

LIBEL — PROVINCE OF JUDGE AND JURY IN PROSECUTIONS FOR. — Although the organic or statutory law of more than twenty of the states makes provision that in prosecutions for libel the jury are to determine the law and the facts, sometimes adding the provision that this shall be done under direction of the court, few cases seem to have arisen where the question is discussed as to how far such a provision deprives the court of the duty or right to present the law of the case to the jury in its instructions. "In Missouri, however, the statute provides that 'in all prosecutions for libel or slander, . . . the jury, under direction of the court, shall determine the law and the fact'; and in *State v. Hoemer*, 85 Mo. 553, the defendant asked the court to instruct 'that, under the law, the jury are to determine the law and facts in this case'; and the court, by Henry, C. J., in speaking of that clause in the statute that the jury, under direction of the court, shall determine the law and the fact, says: 'I confess that I do not fully comprehend the meaning of the remarkable concluding clause of that section. If it means what appellant's counsel contends it does, then, in prosecutions for libel or slander, the court need give no declarations of law to the jury at all.' The instruction he asked was not in the language of the law. From it are omitted the words 'under the direction of the court.' As well contend on such a construction that the jury may determine the facts without regard to the testimony of the witnesses. Can it be that the legislature intended that,

in a prosecution for libel, the jury might try the cause on their own view of the law, and that they should, if they saw proper, disregard instructions the court might give them as the law applicable to the case? If so, then the court should abstain from giving instructions to the jury in prosecutions for libel; whereas, in all other criminal proceedings, it is error not to declare the law to the jury, as has been repeatedly held by this court. If we may venture to construe the language, our conjecture is, that it simply reasserts what has always been the law, that the jury should learn of the court the law applicable to the testimony in the cause, and find the issues of fact under the guidance of the court, as in other causes. If it means more than this, and is as broad in its significance as appellant's counsel contends, then the court, in the trial of such causes, is but a figure-head, and might be dispensed with entirely. We cannot give it such scope as this, and think the court very properly refused the instruction asked. The section is but a declaration of the duty of a jury to determine the law as well as the facts under the direction of the court, and there was no necessity for any instruction based upon that clause of the section. If the jury must determine the law under direction of the court, then they must be guided by the directions which the court may give, and not by what they may determine the law to be. If this is the interpretation to be given it, and certainly it fairly admits of no other, it is impossible to conjecture why that clause was inserted in the section, for it simply declares, with respect to prosecutions for libel, a practice which has always obtained in criminal prosecutions."

And in *State v. Verry*, 36 Kan. 416, the court, in construing a statute providing that "in all indictments or prosecutions for libel, the jury, after having received the direction of the court, shall have the right to determine, in their discretion, the law and the fact," said, per Johnston, J.: "The court submitted the whole issue to the jury, and directed them that they were at liberty to determine the law as well as the fact. But after submitting the whole issue, the court refused to allow defendant's counsel to present or argue to the jury a contrary view of the law from that taken and stated by the court in its instructions. This was error. It being conceded that the jury had a right to determine the law of the case as well as the fact, the right of defendant, by himself or his counsel, to fairly and fully argue to the jury his theory and view of the law ruling the case must also be conceded. The argument is an important branch of the trial, and is intended to enlighten the jury, and aid them in determining all questions submitted to them. The defendant has a right to make a full defense before the jury, and his counsel have a right to discuss every question, whether of law or of fact, that the jury have a right to decide. The jury being at liberty to decide the law in accordance with or contrary to the opinion of the court, the same freedom and scope must necessarily be given to the defendant's counsel in argument. The argument of counsel is as much a part of the trial as the hearing of the evidence or the instructions of the court. It is a substantial and constitutional right which cannot be taken away. Of course, the court is not to abdicate its power and duty of instructing the jury upon the law of the case. The charge should be as full and complete as in cases where the jury are to implicitly take and follow the law laid down by the court. By reason of the learning and experience of the judge who presides, as well as the authority with which he is invested, the jury will doubtless heed and highly regard his opinion, as they should do, and will incline to adopt it rather than a contrary view presented by counsel; but the instructions he gives are only advisory, and the jury are not in duty bound to accept and

follow his views, and hence the defendant, by his counsel or by himself, has a right to present and impress upon the jury views and interpretations of the law inconsistent with those stated by the court. The argument must of course be confined to the issues of the case, and must be presented in a respectful manner, and the court may also restrict the time to be occupied in argument within reasonable bounds, but it is error to restrict the argument of the defendant to the theory of law presented by the court in its instructions."

It has been held, under a similar statute, that, in civil and criminal prosecutions for libel, the court may express to the jury its opinion whether the publication is libelous; but, in criminal cases, the court is not bound to express an opinion; if it does, the jury may disregard it, and if they find for defendant, a new trial cannot be granted without his consent. While the jury are to determine the law and the facts, still the court, in civil cases, must instruct them that the publication is libelous or not, supposing the innuendoes to be true; but where the words are of doubtful import, the truth of the innuendo should be left to the jury: *Pittock v. O'Niell*, 63 Pa. St. 253; and so in *Bourresseau v. Detroit Evening Journal Co.*, 63 Mich. 425, 6 Am. St. Rep. 320, it is said that when the publication is plainly libelous on its face, and needs no explanation to determine its character in that respect, the court may decide and rule it to be libelous, and if its meaning is plainly not libelous, the court may declare it not actionable, and instruct the jury accordingly; but where any doubt exists as to the meaning of the publication so that extrinsic evidence is needed to determine its character as actionable or non-actionable, it is then a question for the jury, under proper instructions, to find its significance. These rules are maintained by the courts of most of the states: *Donaghue v. Gaffy*, 54 Conn. 257; *Sabe v. McGinnis*, 68 Ind. 538; *Gregory v. Atkins*, 42 Vt. 237; *Hunt v. Bennett*, 19 N. Y. 173; *Banner Publishing Co. v. State*, 16 Lea, 176; 57 Am. Rep. 216; *Pugh v. McCarty*, 44 Ga. 383; *Gotteluhrt v. Hutachek*, 36 Wis. 515; *Pittsburgh etc. Ry. Co. v. McCurdy*, 114 Pa. St. 554; *Twombly v. Monroe*, 136 Mass. 464; *Van Vechten v. Hopkins*, 5 Johns. 211; 4 Am. Dec. 339. It is said in *State v. Jeandell*, 5 Harr. (Del.) 475, that the question of libel or no libel is one of law, upon which the court instructs the jury; and it is the duty of the latter to follow such instructions as evidence of the law.

Where the facts are undisputed, the court is to determine whether the words charged as libelous are privileged: *Press Co. v. Stewart*, 119 Pa. St. 584; *Neeb v. Hope*, 111 Id. 145. But when the circumstances of the publication are controverted or uncertain, the court must instruct the jury what circumstances would render it privileged, and then leave the jury to determine whether it constitutes libel: *Duncan v. Brown*, 15 B. Mon. 186. In *People v. McDowell*, 71 Cal. 194, it was held that the court should not instruct the jury that they may, if they see proper, ignore the law defining libel; that while in actions for criminal libel the jury are to determine the law and the fact, they are not at liberty to determine that what the statute declares to be criminal libel is not such.

LIBEL — PUBLICATION BY LETTERS. — No action will lie against a defendant for libel published only by writing a letter containing libelous charges, and mailing it to the plaintiff: *Spaite v. Poundstone*, 87 Ind. 522; 44 Am. Rep. 773; even though plaintiff himself makes public the words used in such letter: *Ponville v. McNease*, Dud. (S. C.) 303; 31 Am. Dec. 556. But the sender of a letter containing libelous words against a third party is responsible for its further publication, if such further publication was a probable consequence

of his sending it: *Miller v. Butler*, 6 Oush. 71; 52 Am. Dec. 768, and note 770. And so the sending of a letter by one person to another, in which libelous words about a third person are found, is such a publication as will warrant an action by the person libeled: *Adams v. Laseon*, 17 Gratt. 250; 94 Am. Dec. 455, and note. And it may even be libel to send a letter containing libelous words to the person alone against whom such words are written; as, for instance, the sending by a servant a letter to a neighbor's wife, asserting that she had invited the writer to meet her, and proposing a private meeting at a time and place specified: *Rolland v. Batchelder*, 84 Va. 664; *State v. Avery*, 7 Conn. 266; 18 Am. Dec. 105; compare *Gough v. Goldsmith*, 44 Wis. 262; 28 Am. Rep. 579.

MOTIONS IN ARREST OF JUDGMENT. — A judgment can be arrested only for defects appearing upon the record: *State v. Creight*, 1 Brev. 169; 2 Am. Dec. 657; *Sasscer v. Walker*, 5 Gill & J. 102; 25 Am. Dec. 272; *State v. George*, 8 Ired. 324; 49 Am. Dec. 392; *State v. Carver*, 49 Mo. 588; 77 Am. Dec. 275. Where a court has acquired jurisdiction, judgment will not be arrested, if the complaint contains one good paragraph: *Lange v. Dammer*, 119 Ind. 568.

TARVER v. GARLINGTON.

[27 SOUTH CAROLINA, 107.]

PRINCIPAL AND AGENT. — NOTE SIGNED S. G. D., AGENT, must be treated as the note of S. G. D.; and parol evidence is not admissible to prove that it is the note of another person, unless that person carried on business in the name of such agent. In that event, the name of agent must be regarded as the business name of the principal.

PRINCIPAL AND AGENT. — A COMPLAINT ALLEGING THAT THE DEFENDANTS, BY THEIR AGENT, through a note signed by such agent in his own name, "agent," promised to pay plaintiff a specific sum of money, states a cause of action. A demurrer of such complaint admits the agency and the promise, and does not raise the question whether parol evidence is admissible to prove that such note was executed by the defendants through their agent.

N. B. Dial, for the appellant.

John W. Ferguson, contra.

SIMPSON, C. J. The action below was commenced for the recovery of a certain sum of money alleged to be due the plaintiff from defendants. The complaint was, in substance, as follows, to wit: That the defendants, through their agent, S. D. Garlington, made their note in writing, whereby they promised to pay the plaintiff or order \$460 on the first day of November, 1884, with interest at seven per cent, a copy of which note was attached to the complaint; and after the usual allegations of ownership and non-payment, judgment

was demanded for said amount. The copy note attached was as follows:—

"\$460. On the first day of November next I promise to pay Samuel J. Tarver or order \$460, for value received, with interest from date at the rate of seven per cent per annum. Witness my hand and seal this March 22, 1884.

"(Signed)

S. D. GARLINGTON, Agent."

The defendant George F. Young put in an answer denying that Garlington was his agent, and denied the alleged indebtedness; the time for Mary Garlington had not expired, and she had not answered at the ensuing court. When the case was called, and the complaint and answer of George F. Young read, he interposed an oral demurrer that the complaint did not state facts sufficient to constitute a cause of action, which his honor, Judge Aldrich, sustained, dismissing the complaint with costs as to the defendant George F. Young, with leave, however, to the plaintiff to amend his complaint. From this order this appeal is before us.

The ground upon which the demurrer was interposed, and upon which, as we suppose, it was sustained, was, that a party could not be bound as principal upon a note where it was signed by another simply as "agent," as this note was signed; that under the law applicable to such cases involving the doctrine of agency, before one could be held liable as principal upon a note or other contract, his name should appear in some form upon the face of the paper, so that from the paper itself the principal could be ascertained; and that, in the absence of such fact, parol testimony was incompetent to discover or develop it. And the defendant contends here that inasmuch as the note sued on, as shown by the copy attached, was signed by S. D. Garlington, "agent," without specifying for whom he was agent, either in the body of the note or attached to the signature, and inasmuch as parol testimony would not be allowed to explain away or remove this difficulty, therefore the facts stated in the complaint fail to show a cause of action.

The principle relied on by respondent is no doubt correct. In fact, at one time in this state this doctrine was carried much further than that contended for here. See the case of *Fash v. Ross*, 2 Hill (S. C.), 294, where it was held that the agent signing his name for another, although the name of the other was mentioned,—thus A B for C D,—was not sufficient. This case was, however, overruled with the cases that had followed

it by the case of *Robertson v. Pope*, 1 Rich. 503; 44 Am. Dec. 267; and now the doctrine as to unsealed contracts, negotiable notes, etc., is as stated by the respondent, to wit, that the name of the principal must appear on the paper, so that from the paper itself the principal can be known. This is the general rule, and it is said by some that to this rule there is no exception. In a note to Parsons on Notes and Bills, 92, however, it is stated that there is at least one exception apparent, if not real, to wit, where the principal carries on business in the name of the agent. In that case, the name of the agent is the name of the principal, *pro hac vice*: *Bank of Rochester v. Monteath*, 1 Denio, 402; 43 Am. Dec. 681. In the case of *Hix v. Hinde*, 9 Barb. 528, where one had drawn a draft in his own name, styling himself simply "agent," without more, it being known at the time by all of the parties for whom he was acting as agent, it was held sufficient to charge his principal. It is true, however, that in that case a distinction was drawn between a draft and an ordinary note or contract.

The principle upon which it has been held that where the name of the principal appears anywhere on the note, the agent himself is relieved from liability, and liability attaches to said principal, is, that the principal is known at the time of the contract, and the contract is really made with him. It was upon this principle that *Fash v. Ross*, *supra*, was overruled by *Robertson v. Pope*, *supra*, thus differentiating ordinary unsealed contracts from the technical rule governing sealed contracts in this respect. And in the case of *Robertson v. Pope*, *supra*, Judge O'Neill said the proof was abundant that Byers (the party who signed the note thus, "for Nath'l Pope, Sam'l Byers") "was the agent of Byers, and that Pope received half of the cattle bought for Neuffer and him." Neuffer was the other maker of the note sued on. And it seems that parol testimony was received in that case to show that Pope was a principal in the note.

Now, in the case before us, the question how far parol testimony may be allowed to come in, to explain and to fix the application of the term "agent," as used here, has not been adjudicated by the court below; at least, there does not appear any distinct and positive ruling on this question by his honor. He simply, and in short form, sustains the demurrer. This question, then, not being strictly before us, we pass it by. The case comes up on demurrer to a complaint, in which plaintiff alleges that the defendants, through their agent, on a

note signed by said agent in his own name, "agent," promised to pay him \$460. Under the rules of law and evidence, it may be that the plaintiff would not be allowed to go beyond the face of the note, and prove by parol that S. D. Garlington, in signing this note, promised for and as agent of the defendants, as alleged in the complaint, and if the case had gone to the jury, it may be that, such parol evidence being excluded, the plaintiff would have failed in his action. But here the defendant admits the truth of the allegations, to wit, that S. D. Garlington had promised for him, and as his agent, to pay said money. He admits the agency, admits the promise, and that it was made by the note, a copy of which is attached. In other words, so far as the demurrer is concerned, he waives his right, if he has any, to exclude parol testimony on the question of the agency, and admits it. Upon these facts admitted, the question of law is raised for the judge; whereas, if the case was before the jury, the first question would be, Has the agency been established? Upon the face of the paper, unexplained by parol testimony, the jury would be compelled, under the cases above, to answer in the negative. But before the judge, with the agency not even disputed, but actually admitted, it seems to us it was error to hold that there was no cause of action.

It appears that there is at least one exception to the general rule above stated: Note to Parsons on Notes and Bills, 95; *non constat* but the plaintiff may be able to bring his case under that exception. Besides, the plaintiff should have the right to test the question how far parol testimony may be admitted in a case of this kind.

It is the judgment of this court that the judgment of the circuit court be reversed.

PRINCIPAL AND AGENT—LIABILITY OF AGENT—PAROL TESTIMONY.—Where an agent signed a bill of exchange thus "T. R. T., agent for S. T.," and nothing appeared in the body of the bill showing an intent to bind the principal, the contract was that of the agent, not of the principal, and parol testimony could not be admitted to show an intent to bind the principal: *Tannatt v. Rocky Mountain Nat. Bank*, 1 Col. 278; 9 Am. Rep. 156, and note 163; to the same effect is *Sturdivant v. Hull*, 59 Me. 172; 8 Am. Rep. 409. But where an instrument was drawn, "We, the president and directors," etc., and signed by each individually, parol testimony could be admitted to show that the instrument was given and received as the instrument of the company of which the individuals were officers, not their own personal contract: *Haile v. Pierce*, 32 Md. 327; 3 Am. Rep. 139. Where it is uncertain on the face of the instrument whether it was intended to bind the principal or the

agent, parol evidence can be admitted to explain such latent ambiguity: *Musser v. Johnson*, 42 Mo. 74; 97 Am. Dec. 316; *Martin v. Smith*, 65 Miss. 1; and parol evidence is even admissible to vary the effect of a note by showing an intention to bind the principal, when such note is signed by the agent as an agent, without mentioning the principal's name: *Collins v. Buckeye S. I. Co.*, 17 Ohio St. 215; 93 Am. Dec. 612; but see *Ashley v. Bird*, 1 Mo. 640; 14 Am. Dec. 313.

AGENCY — AGENT WHEN PERSONALLY LIABLE. — Agents have been held personally liable on contracts executed by them as agents bearing the following signatures respectively: "A B, ag't": *Williams v. Robbins*, 16 Gray, 77; 77 Am. Dec. 396; "George Moore, treasurer of M. F. D. Ass'n": *Mellen v. Moore*, 68 Me. 390; 28 Am. Rep. 77; *Sturdivant v. Hull*, 59 Me. 172; 8 Am. Rep. 409; "H. S. Lucas [seal], for Charles Callender, pres. of Chester etc. Co.": *Bryson v. Lucas*, 84 N. C. 690; 37 Am. Rep. 634; "D, in behalf of the city of Providence": *Providence v. Miller*, 11 R. I. 272; 23 Am. Rep. 453; "T. R. T., agent for S. T.": *Tannatt v. Rocky Mountain Nat. Bank*, 1 Col. 278; 9 Am. Rep. 156; "A, B, and C, as trustees of etc. society": *Burlingame v. Brewster*, 79 Ill. 515; 22 Am. Rep. 177. But agents have been held to be not personally liable upon contracts executed by them as agents bearing the following signatures respectively: "A, by D," where D was in fact the authorized agent of A: *Weaver v. Carnall*, 35 Ark. 198; 37 Am. Rep. 22; "A, agent," when plaintiff knew A was actually acting as agent for his wife: *Eyington v. Simpson*, 134 Mass. 169; 45 Am. Rep. 314, "F., treasurer," where the words "Ætna Mills" appeared in the margin of the instrument: *Carpenter v. Farnsworth*, 106 Mass. 561; 8 Am. Rep. 360; "N. D. Co., by E. L., president": *Northwestern Distilling Co. v. Brant*, 69 Ill. 658, 18 Am. Rep. 631; "A C, cas.": *Houghton v. First Nat. Bank*, 26 Wis. 663; 7 Am. Rep. 107; "A, as agent of B": *Magill v. Hinsdale*, 6 Conn. 464; 16 Am. Dec. 70; "A, B, agent for C D": *Garrison v. Combs*, 7 J. J. Marsh. 84; 22 Am. Dec. 120; "Pro W. G. — J. S. C.": *Long v. Colburn*, 11 Mass. 97; 6 Am. Dec. 160; "P. and J., for G.": *Rice v. Gove*, 22 Pick. 158; 33 Am. Dec. 724; *Worrall v. Munn*, 5 N. Y. 229; 55 Am. Dec. 330; *Mussey v. Scott*, 7 Cush. 215; 54 Am. Dec. 719. For full discussions upon this subject, see note to *Andrews v. Estes*, 26 Id. 524, 525; note to *Bank of R. v. Monteath*, 43 Id. 684; note to *Means v. Swormstedt*, 2 Am. Rep. 332, 333; note to *Knight v. Clark*, 57 Id. 536, 537; note to *Revolving S. Co. v. Tuttle*, 47 Id. 818, 819.

AGENCY — WHEN PRINCIPAL IS LIABLE ON WRITTEN CONTRACTS MADE BY AGENT. — Written contract executed by an agent must, in order to bind the principal, purport upon its face to be the principal's contract: *Merchants' Bank v. Central Bank*, 1 Ga. 418; 44 Am. Dec. 665; *Clealand v. Walker*, 11 Ala. 1058; 46 Am. Dec. 238; *contra*, *Violetti v. Powell*, 10 B. Mon. 347; 52 Am. Dec. 548.

AGENCY, SIGNIFICANCE OF WORD "AGENT." — The word "agent" appended to a name is merely *descriptio personæ*: *Clay v. Day*, 2 Greenl. 305; 11 Am. Dec. 99; *Cocke v. Dickens*, 4 Yerg. 29; 26 Am. Dec. 214. But in *Sagre Nichols*, 7 Cal. 535, 68 Am. Dec. 280, "agent" was declared to be not merely a *descriptio personæ*, but also a designation of the capacity in which the person acts to whose name it is appended.

DEMURRERS ADMIT ALL MATERIAL FACTS WHICH ARE WELL PLEADED, and all necessary inferences from such facts: *Pennsylvania Co. v. Stegemeier*, 118 Ind. 305; 10 Am. St. Rep. 136, and note 143; *Supply Ditch Co. v. Elliott*, 10 Col. 327; 3 Am. St. Rep. 586, and note 594.

SMITH v. SMITH.

[27 SOUTH CAROLINA, 166.]

ALTERATION OF A NOTE SECURED BY MORTGAGE, WHILE IT AVOIDS SUCH NOTE, DOES NOT AFFECT THE MORTGAGE, and the latter may be enforced to compel payment of the debt for which the note was given.

Westmoreland and Dorroh, for the appellant.

A. Blythe, contra.

MCGOWAN, J. Baylis L. Smith, as the administrator of William C. Yeargin, deceased, instituted this action for the purpose of having lands of the intestate sold in aid of the personalty in paying debts and for partition. The heirs at law of the intestate were made parties, and also one Alexander Spillars, who held a mortgage of the lands of the intestate. An order was passed calling in the creditors to present and prove their demands before the master, S. J. Douthit, Esq. Among the creditors who presented demands was the said Alexander Spillars, who presented and proved a note as follows:—

“\$300. One day after date I promise to pay A. Spillars or order three hundred dollars for value received, with ten per cent per annum.

“This twenty-third day of December, 1882.

[Signed]

“W. C. YEARGIN. [L. S.]”

Indorsed: “October 27, 1883. Received interest in full on the within to December 23, 1884. December 1, 1884. Received interest in full on the within to December 23, 1885.”

He also proved a mortgage of 140 acres of land, executed to him by the said intestate, Yeargin, to secure the same debt. It was admitted that the words “with ten per cent per annum” were put in the note by the directions of Mr. Spillars after the death of the intestate, without the knowledge or consent of the plaintiff (his administrator), and were erased after the suit was commenced, or crossed out by said Spillars. The defendant (Spillars) offered to prove by parol testimony that the agreement between him and the intestate, at the time and before the execution of the note, was, that the intestate was to pay interest at the rate of ten per cent per annum, and that it was simply an omission on the part of the party who drew the note that it was not drawn in that way; and that neither discovered that it was not so drawn until the first interest was paid thereon. The testimony was excluded on the ground

that parol testimony cannot be introduced to alter or vary the written instrument. The master, therefore, held that the words as to the interest added to the note by the direction of Spillars rendered it void.

His report then proceeds: "The next question, then, to be considered is, The note being void, can the mortgage be established as a valid and subsisting claim independent of the note? Both parties cite and rely upon the same authority (*Plyler v. Elliott*, 19 S. C. 264), the plaintiff contending that the difference in this case from that is, that the mortgage there does not refer expressly to the note, while here it does, and therefore the mortgage cannot be separated from the note so as to stand as a valid claim of itself, as it would be impossible to establish the mortgage without referring to the note. After a careful examination of the case referred to, the master is unable to distinguish any material difference between it and the one under consideration, for it seems to him that the doctrine there intended to be enunciated is, that both the bond and mortgage are evidences and securities for the same debt, and although one may be rendered void, it does not take away the right to enforce the other. The mortgage in question certainly furnishes enough evidence independent of the note to establish the amount due thereon, for it recites that the condition of the note is 'for the payment of the full and just sum of three hundred dollars, of same date herewith,' etc. The master, therefore, finds that the mortgage in itself is a valid claim against the estate of the intestate herein," etc.

Upon exceptions to this report, the cause came on to be heard by Judge Fraser, who confirmed the report, and made it the judgment of the court. From this order the plaintiff (administrator) appeals to this court upon the grounds: "1. Because his honor erred in adjudging that the mortgage in question was a valid subsisting security, irrespective of the note it was given to secure; 2. Because his honor erred in adjudging that said mortgage furnished evidence sufficient, independent of said note, to establish the amount due thereon; 3. Because his honor erred in not adjudging that said note was the original contract and primary evidence of the debt, as shown by reference thereto in the conveying part of said mortgage, and that the invalidation of said note destroyed the validity of said mortgage."

We agree with the master and circuit judge that this case is concluded by that of *Plyler v. Elliott*, 19 S. C. 264. We do

not deem it necessary to add anything to what is said in that case, or to reopen the argument; but simply to make one or two observations. It is certainly a mistake to consider the note as the debt itself, for all agree that even after the note is barred, a mortgage given to secure the same debt may be enforced: *Nichols v. Briggs*, 18 Id. 484. But there seems to be an idea that there must of necessity be a difference when the note is made void by an alteration,—that in such case, the act, being fraudulent, reaches beyond the security altered, and as a sort of penalty avoids the debt itself and all other securities. The rule as to the alteration of written securities, as announced by Mr. Greenleaf, is, that “written instruments which are altered in the legal sense of that term are thereby made void”; that is, the instrument altered is made void,—nothing is said as to the effect on the debt itself or other securities.

Gillett v. Powell, Speers’ Eq. 144, is our leading case on the subject, and it is suggested that, though a case of alteration, the alteration there was “innocent,” and therefore the punishment of avoiding the debt was not applied. I do not clearly see how it can be assumed that the alteration in that case was “innocent.” In the report of the case, Chancellor Harper says: “At the sale by the administrator *de bonis non*, James Higginbotham became the purchaser of slaves to the amount of \$2,337.75. He gave his bond for the amount, and on the same day executed a mortgage of the slaves, conditioned to be void on the payment of \$2,337.75. . . . On the production of the bond it was found to have been altered, so as to be conditioned for double the amount that was actually intended to be secured. The commissioner decided correctly that the bond was void for the alteration.” And in delivering the judgment of the then appeal court in equity, Chancellor Dunkin said: “The court has no disposition to call in question the decision of *Mills v. Starr*, 2 Bail. 359. If Powell had no demand at law but on the bond, and he had lost that by his own fault or folly in altering the condition, he would be entitled to no aid from the court (equity). But we can go no further. If, as illustrated by the chancellor (Harper), he had taken another bond with a surety instead of the mortgage, this alteration of the original bond would not prevent his recovery at law on that which had been taken as collateral security, and this court (equity) would not interfere, but on payment of the amount really due.” Besides, *Gillett v. Powell*, *supra*,

is generally regarded in and out of the state as a leading case, and is cited as one in which "the bond was fraudulently altered and made void": See Herman on Mortgages, sec. 293, and note. If, as argued, the alteration in that case was not fraudulent, for the reason that it "worked no injury to the maker," the same assuredly may be said in this case.

The judgment of the court is, that the judgment of the circuit court be affirmed.

ALTERATION OF INSTRUMENTS. — A mortgagee who fraudulently alters the mortgage notes thereby releases and discharges the debt, and cannot foreclose the mortgage, which is a mere incident of the debt: *Vogel v. Ripper*, 34 Ill. 100; 85 Am. Dec. 298. Where, after a mortgage is executed by a man and his wife to secure a note upon which the mortgagee is indorser for the husband and wife, the note is changed with the husband's consent, and not the wife's, so as to release one of the co-makers of such note, the wife's inchoate interest is fully discharged from the lien of the mortgage: *Crawford v. Haselrigg*, 117 Ind. 63.

ALTERATION OF NEGOTIABLE INSTRUMENTS. — The payee or any indorsee may insert the word "I" or "we" in a blank space preceding the words "promise to pay," in a promissory note, and such insertion will not impair the validity of such note: *Brown v. First Nat. Bank*, 115 Ind. 572. The fraudulent detachment from a negotiable promissory note, by the payee, of a stub on which is written, as a part of the note, a condition for the maker's benefit, is a material alteration, and avoids the note, even in the hands of an innocent indorsee, before maturity, without notice of such alteration: *Stephens v. Davis*, 85 Tenn. 271. Judgment was erroneously entered upon a promissory note, where an issue as to a material alteration in such note remained undisposed of: *Black v. De Camp*, 75 Iowa, 106. The question of an alleged alteration in a receipt and guaranty is for the jury: *Lamb v. Briggs*, 22 Neb. 138.

JOHNSON v. JOHNSON.

[27 SOUTH CAROLINA, 306.]

POWER OF SALE GIVEN IN A MORTGAGE TO A MORTGAGEE IS VALID, but the court will closely scrutinize sales made thereunder.

MORTGAGE GIVING POWER TO THE MORTGAGEE TO SELL THE MORTGAGED PREMISES DOES NOT CONVEY to him legal title thereto. The title remains in the mortgagor, and any sale or conveyance thereof must be in his name.

POWER OF SALE GIVEN IN A MORTGAGE IS, IN SOUTH CAROLINA, REVOKED BY THE DEATH OF THE MORTGAGOR, because in that state a mortgagor retains the legal title, and the mortgagee therefore has not a power coupled with an interest.

Holmes and Simpson, for appellants.

Cunningham and Harris, contra.

McGOWAN, J. On November 17, 1879, one Joshua M. Johnson, in order to secure a note for \$150, due to John H. Neighbors, executed to him a mortgage of a tract of land containing 114 acres, and Louisa Johnson, the wife of the said mortgagor, relinquished her dower in the said premises. The mortgage contained a power of sale as follows: "But in case of the non-payment of the said sum, etc., . . . then, and in such case, it shall and may be lawful for the said John H. Neighbors, his heirs, executors, administrators, and assigns, and the said Joshua M. Johnson doth hereby empower and authorize the said John H. Neighbors, his heirs, executors, administrators, or assigns, to grant, bargain, sell, release, and convey the said premises, with the appurtenances, at public auction or vendue, at which sale they, or any of them, shall have the right to become purchasers of the said premises, and on such sale to make and execute to the purchaser or purchasers his, her, or their heirs or assigns forever, a conveyance in fee of the said premises, free and discharged from all equity of redemption, right of dower, and every other encumbrance," etc. On January 6, 1881, the mortgagee, Neighbors, assigned the note and mortgage to the plaintiff, Margaret Johnson, and in the year 1882 Joshua M. Johnson, the mortgagor, died intestate, seised and possessed of the said premises; leaving as his heirs at law, his widow, Louisa Johnson, and five minor children, who are the defendants.

On December 22, 1883, after the death of the mortgagor, Margaret Johnson, the assignee of the note and mortgage, advertised the land for sale in the town of Clinton, county of Laurens, at twelve o'clock, m., of January 12, 1884, by posting written notices of the sale on the door of the court-house, and at three other public places of the county. This advertisement made no reference to the previous death of the mortgagor, Joshua M. Johnson, or mention of his widow and children, his heirs at law. At the sale, the land was bid off by one Pitts for \$325, who refused to comply with the terms of sale, and James L. Simpson agreeing to take his bid on January 24, 1884, a deed was made to him by the plaintiff in her own name, without any reference to the previous death of Joshua M. Johnson, the mortgagor, or mention of his heirs, the widow and children. This deed was recorded. It seems that the sale was reasonably well attended, the widow, Louisa Johnson, with others, being present; and that the land sold for what was considered a fair price. Simpson agreed with

the widow, Louisa, that she might remain on the land for the remainder of the year for a certain rent.

Simpson, to whom the land was conveyed, never paid the purchase-money, but on January 5, 1885, in pursuance of a previous agreement to that effect, conveyed it back to Margaret Johnson, who credited \$195.90, the amount due on the mortgage debt owned by her as assignee, and brought this action against the heirs at law of the deceased mortgagor, Joshua M. Johnson,—1. To confirm the sale and conveyance made by her as assignee; 2. For leave to pay into court the excess of the purchase-money over the mortgage debt; and 3. That the plaintiff may be put into possession of the said premises, and for the costs of the action, etc. The minor defendants made formal answer, but the widow, Louisa Johnson, answered, resisting the claim, upon the ground that she and her children were in possession as the heirs at law of the mortgagor; and that they were never made parties to any proceeding of foreclosure, so as to divest them of the legal title; and the plaintiff, Margaret Johnson, has no title under the illegal and void sale by her, and that her action should be dismissed.

The cause was referred to the master, C. D. Barksdale, Esq., "to ascertain and report on all the issues of law and fact involved." He took the testimony, which is in the brief, recommended that the prayer of the complaint should be granted; and his honor, Judge Aldrich, confirmed the report. From this decree the defendants appeal to this court, upon the following grounds:—

"1. Because his honor erred in holding that the advertisement for sale was sufficient, and that the sale was valid.

"2. Because he erred in not holding that the parties having the equity of redemption should have been named in the advertisement of sale.

"3. Because he erred in not holding that the sale, under power to sell in a mortgage at public auction or vendue, should conform to public sales, when made under foreclosure of mortgage by order of court.

"4. Because he erred in holding that the land sold for a fair price.

"5. Because he erred in not holding that the sale was invalid, because the person who bid off the land refused to comply, and the person to whom the deed was claimed to have

been executed never complied nor paid the purchase-money, which, in fact, has never been paid.

"6. Because he erred in not excluding parol testimony to establish the transfer of the bid of John H. Pitts to James L. Simpson; and also in not holding that there was no legal transfer made under the statute of frauds.

"7. Because he erred in not holding that the execution of the deed from Margaret Johnson to James L. Simpson was not proved, and in not excluding the testimony taken before trial justice Irby.

"8. Because he erred in not holding that the deed of Margaret Johnson to James L. Simpson was invalid, because executed in the name of the mortgagee, when it ought to have been executed by the mortgagor, as attorney in fact, in the name of the parties in whom was the legal title.

"9. Because the mortgagor having died, he erred in not holding that the mortgagee, under the terms of the mortgage, had no right to sell and bar the rights of the infant defendants, heirs at law, and others, creditors, without a regular foreclosure by order of court.

"10. Because he erred in holding that Louisa Johnson was estopped from denying the validity of the sale by her presence at the sale, or by undertaking to rent, if the deed was afterwards improperly executed, and she was ignorant of her rights and mistaken as to her remedy.

"11. Because he erred in not holding that the minor defendants were not estopped by the acts of Louisa Johnson."

As we understand it, this is an action for the recovery of real estate upon title claimed to arise out of a sale made under a power contained in a mortgage; but if it should be found that said sale was irregular, and the title thereby acquired defective, then incidentally to cure the defect and validate the title. It is familiar doctrine that in an action for the recovery of the possession of real estate, the plaintiff must recover upon the strength of his own title, considered with reference to the time the action was brought. If the title was then perfect, no confirmation is necessary; but if it was then imperfect, we do not clearly see how the court can, by subsequent proceedings, so validate it as to affect retrospectively the right existing when the suit was brought: See *Moon v. Johnson*, 14 S. C. 434.

It has always seemed to us somewhat anomalous doctrine, that a mortgagor of real estate may include in the mortgage

a power to the creditor himself to sell the mortgaged premises without any order of foreclosure in a regular proceeding, such power being entirely *ex parte*, and carrying, as claimed, not only the right to ascertain the amount due on the mortgage debt, but to judge of the necessity for a sale, its time, place, terms, etc., and to execute title to the premises so sold. This anomaly is more striking in those states, as in South Carolina, where it is expressly provided by statute that a mortgage of real estate is a mere security, and even after condition broken the legal title remains in the mortgagor or his heirs. We incline to think that experience in the administration of the law has shown that this effort, by a summary proceeding to avoid litigation and expense, has really increased both, and demonstrated the wisdom of Lord Eldon, when he said: "How can it be right that such a clause shall be inserted in a deed under which a party is trustee for himself? . . . Here, too, it must be recollected that this is a clause to be acted upon, not by a middle person, who is to do his duty between the *cestuis que trust*, but the mortgagee is himself made trustee to do all these acts." The same learned chancellor, however, said at the same time: "But it is too much to say that if the one party has so much confidence in the other as to accede to such an arrangement, this court is, for that reason, to impeach the transaction," etc.

While, however, the court will not now set aside a power authorizing the creditor, who is the interested party, to sell lands mortgaged, for the reason that it is the contract of the parties themselves, yet all the authorities agree that "as such power may be so easily used for purposes of oppression, the courts should scrutinize sales made under them very closely": *Robinson v. Amateur Association*, 14 S. C. 148. From the view the court takes, it will not be necessary in this case to consider whether the power of sale went with the mortgage to the assignee, Margaret Johnson, nor whether the mode of conducting the sale should have been conformed, as far as possible, to that of ordinary judicial sales, nor whether the vendor, Margaret Johnson, when Pitts failed to comply with the terms of sale, had the right to substitute for him as the last bidder Simpson, and without any consideration paid, to accept from him a conveyance for the premises sold. This circuitry of conveyance was manifestly designed as the means of carrying back the title to Margaret Johnson, the vendor, and must be considered as substantially the same as if Margaret Johnson,

the assignee and vendor, had bid off the property at her own sale, and then in her own name conveyed it directly to herself.

The main question is, whether, after the death of the mortgagor, Joshua M. Johnson, leaving his widow and children in possession of the premises, the mortgaged premises could be sold and conveyed by Margaret Johnson in her own name, without any reference whatever to the death of the mortgagor or his heirs at law, some of whom were infants. This must, to a large extent, depend upon the determination as to whose the legal estate was at the time of the death of the mortgagor. There cannot be the slightest doubt that, at the time of the death of the mortgagor (so far as the mortgage itself was concerned), the title was in the mortgagor, and at his death descended to his heirs. It is true that, according to the common law, a mortgage was a "conveyance of an estate by way of pledge for the security of a debt, and to become void upon the payment of it." But it is quite as clear that in our state, by the act of 1791 (now embodied in section 2299 of the General Statutes), the legal title, upon the execution of a mortgage, remains in the mortgagor, and "the mortgagee shall not be entitled to maintain any possessory action for the real estate mortgaged even after the time allotted for the payment of the money secured; but the mortgagor shall be deemed owner of the land, and the mortgagee as owner of the money lent or due; and shall be entitled to recover satisfaction for the same out of the land by foreclosure and sale according to law": See *Simons v. Bryce*, 10 S. C. 368; *Warren v. Raymond*, 17 Id. 163.

It is, however, contended that the power of sale clause in the mortgage had the effect of conveying the legal title away from the mortgagor and his heirs. We confess we cannot so see it. The important words are: "And the said Joshua M. Johnson doth hereby empower and authorize the said John H. Neighbors, etc., to grant, bargain, sell, release, and convey the said premises, etc., at public auction or vendue; at which sale they, or any of them, shall have the right to become purchasers of the said premises, and on such sale to make and execute to the purchaser or purchasers a conveyance in fee of the said premises, free and discharged from all equity of redemption," etc. We see here no terms of transfer, conveyance, or assignment, but the words "empower and authorize" are those appropriate in a power of attorney, as to which the attorney acts in the name and for the benefit of the principal creating the power. It seems that there is such a thing as a trust deed of

land as a security, providing that the land shall be sold by the trustee and the proceeds applied to the debt. But, as we understand it, such deeds differ essentially from a mere power of sale; they do in terms carry the legal title of the property to the trustee to be sold and applied by him as a personal trust and confidence, which cannot be delegated except as provided by the person who created the trust: See 2 Jones on Mortgages, sec. 1788.

As we have seen that the clause in question did not transfer the title which remained in the mortgagor, but only gave a power of sale, that power assuredly could only be executed in the name of the principal: *Webster v. Brown*, 2 S. C. 429; *De Walt v. Kinard*, 19 Id. 292. It is said, however, that Margaret Johnson did not execute the deed in the name of the principal, Joshua M. Johnson, for the very good reason that at the time of the sale he was dead, and most of his heirs, to whom the title had descended, were infants, and incapable of conveying the title.

This fact suggests another difficulty in the way of the plaintiff's recovery on her own title. We think that the power of sale given by Joshua M. Johnson was revoked by his death; and if so, of course, it was incapable of execution. The power of one man to act for another must depend on the will of that other, and when it is withdrawn the power ceases. As the power of sale in this case formed a part of a contract for consideration, it may be conceded that it could not have been revoked in the lifetime of the creator of it; but, nevertheless, we think it was revoked by his death. It certainly was, unless it belonged to that exceptional class where the "power is coupled with an interest": *Hunt v. Rousmanier's Adm'rs*, 8 Wheat. 205; *Lockett v. Hill*, 1 Wood, 558, and cases there cited. Was the power here, in the sense of the rule, "coupled with an interest"?

I freely confess that the phrase "a power coupled with an interest" never seemed to me to convey a very clear and definite idea. I am content to adopt the views of Chief Justice Marshall upon the subject, as expressed in the case from Wheaton, above cited, where he says: "What is meant by the expression 'a power coupled with an interest'? Is it an interest in the subject on which the power is to be exercised, or is it an interest in that which is produced by the exercise of the power? We hold it to be clear that the 'interest' which protects a power after the death of the person who creates it

must be an interest in the thing itself. In other words, the power must be ingrafted on an estate in the thing. If we are to understand by the word 'interest' an interest in that which is to be produced by the execution of the power, then they are never united; the power, to produce the interest, must be exercised, and by its exercise is extinguished. The power ceases when the interest commences, and therefore cannot, in accurate law language, be said to be 'coupled' with it. But the substantial basis of the opinion of the court on this subject is found in the legal reason of the principle. The interest or title in the thing, being vested in the person who gives the power, remains in him, unless it be conveyed with the power, and can pass out of him only by a regular act in his own name. The act of the substitute, therefore, which in such a case is the act of the principal, to be legally effectual, must be in his name — must be such an act as the principal himself would be capable of performing, and which would be valid if performed by him. Such a power necessarily ceases with the life of the person making it," etc.

We are aware that Mr. Jones (2 Mortgages, sec. 1794) has expressed the opinion that "the rule is the same in those states where, by statute or adjudication, a mortgage is regarded as a mere security for debt, passing no title or estate to the mortgagee; the power of sale is coupled with an interest, and is irrevocable, just the same as it is where the common-law doctrine that the mortgage conveys the legal estate still prevails"; and cites as authority for the proposition the case of *Calloway v. People's Bank of Bellefontaine*, 54 Ga. 441. But as the learned author in the same book repeatedly declares that the deed of sale under the power should be made by the holder of the legal title, we must suppose that he failed to note clearly the great difference as to title between a common-law mortgage and one executed under a statute such as that in this state.

The judgment of this court is, that the judgment of the circuit court be reversed, and the cause remanded to the circuit, with leave to the plaintiff to move to amend her complaint so as to pray for a regular judicial foreclosure of her mortgage.

Upon this opinion the chief justice and Mr. Justice McIver made the following indorsement:—

We concur in so much of this judgment as reverses the

judgment of the circuit court; but we do not concur in so much of the judgment as allows the plaintiff leave to amend, for the reason that, in our opinion, such an amendment as that contemplated would change substantially the claim of the plaintiff, and cannot be allowed under section 194 of the code.

MORTGAGES—TITLE.—A mortgage is a lien, being a mere security for debt, and payment of the debt discharges it and reverts the mortgaged premises in the mortgagor without a reconveyance: *Lindley v. O'Reilly*, 50 N. J. L. 536; 7 Am. St. Rep. 802; *Thomas v. Morrisett*, 76 Ga. 384; *Atchison v. Pease*, 96 Mo. 566; *Haryadine v. Henderson*, 97 Id. 375; *Navassa Guano Co. v. Richardson*, 26 S. C. 401; *Howe v. Austin*, 40 La. Ann. 323. The mortgagor holds the full legal and equitable title to the mortgaged premises, subject to the lien created by the mortgage for the payment of the debt it is given to secure: *Fuller v. O'Neal*, 69 Tex. 349; 5 Am. St. Rep. 59; and the mortgagor's legal title to the mortgaged premises is not divested by a failure to comply with the conditions of the mortgage, nor by a surrender of possession to the mortgagee: *Berlact v. Halle*, 22 Fla. 236; 1 Am. St. Rep. 185, and note 189, 190. But in some states a mortgage is an actual conveyance of the mortgaged premises to the mortgagee, and is not merely a lien in favor of the mortgagee with the title remaining still in the mortgagor: *Cotton v. Curfield*, 85 Ala. 175; 7 Am. St. Rep. 29, and extended note 31-34. In Illinois, the title of the mortgagee in the mortgaged premises is a base or determinable fee; the term of its existence is measured by the mortgage debt; and when the debt is paid or is barred by the statute of limitations, the mortgagee's title is extinguished by operation of law: *Barrett v. Hinckley*, 124 Ill. 32; 7 Am. St. Rep. 331. When the mortgaged premises are not in the possession of either the mortgagor or mortgagee, the title remains undisturbed as fixed in the mortgage: *Simmons v. Ballard*, 102 N. C. A mortgagee cannot demand possession of the mortgaged premises; but if the mortgagor puts him in possession, the tenancy thereby created cannot be destroyed without notice: *Byers v. Byers*, 65 Mich. 598. The mortgagee has no legal or equitable interest in a policy of insurance effected by the mortgagor upon the mortgaged premises, in the absence of a contract requiring such insurance to be effected for the benefit of the mortgagee: *Nordyke v. Gery*, 112 Ind. 535; 2 Am. St. Rep. 219.

MORTGAGE—POWER OF SALE TO MORTGAGEE.—A power of sale without aid of court may be conferred upon the mortgagee, or grantee in a deed of trust: *Leffler v. Armstrong*, 4 Iowa, 482; 68 Am. Dec. 672; *Carson v. Blakely*, 6 Mo. 273; 35 Am. Dec. 440. But a power of sale to the mortgagee in a mortgage is a power coupled with an interest, and cannot be revoked: *Crampton v. Crane*, 97 Mass. 459; 93 Am. Dec. 106; *Pardoe v. Lindley*, 31 Ill. 174; 83 Am. Dec. 219.

BULWINKLE & Co. v. CRAMER AND BLOHME.

[27 SOUTH CAROLINA, 376.]

WARRANTY OF QUALITY. — A SOUND PRICE REQUIRES SOUND PROPERTY, and a contract for the sale of corn must be read as if the words were added, "corn warranted sound."

A MERE RECEIPT, THOUGH IN WRITING, may be explained by parol evidence.

CONTRACT WHICH MAY NOT BE VARIED BY PAROL. — Memorandum showing the sale of a specific amount of corn, the person to whom sold, the price thereof, and the time when payment is to be made, signed by the sellers, constitutes a contract which parol evidence is inadmissible to vary.

PERSONS EXECUTING A CONTRACT OF SALE AS APPARENT PRINCIPALS will not be permitted to show by parol evidence that they were acting as agents of another, when sued on a warranty implied by such contract.

PAROL EVIDENCE CAN NEVER BE ADMITTED FOR THE PURPOSE OF EXONERATING AN AGENT who has entered into a written contract as principal, even though he should propose to show, if allowed, that he disclosed his agency and mentioned the name of his principal at the time the contract was executed.

Hayne and Ficken, for the appellant.

Simons and Cappellmann, contra.

McGOWAN, J. This was an action against the defendants, Cramer and Blohme, for \$1,138.70, damages sustained upon a lot of shelled corn in sacks, purchased from them by the plaintiffs on May 17, 1884. The following writing was offered as the written contract of the parties:—

"May 17th. Sold H. Bulwinkle & Co.,—

"5,000 bu. mixed sacked corn @ 71½c.

"1,000 " " " " @ 80½c.

"Schooner shipment, payable on arrival. No wharfage.

[Signed]

"CRAMER AND BLOHME."

At the time the purchase was made the corn was not in the city, but soon after, about the last of May or first of June, the schooner *May Williams* reached Charleston with the corn. Upon its arrival in the harbor, the plaintiffs were notified of the fact. Mr. Haesloop, one of the plaintiffs, went down to the vessel, and finding about 150 sacks out, examined the corn in two or three of them, and found that "it seemed good." On June 4th, before all the corn was out of the vessel, the defendants presented their account for the corn, \$4,400.45. The odd cents were paid, and the plaintiffs gave their note as follows:—

"\$4,400.

CHARLESTON, S. C., June 4, 1884.

"Forty days after date, we promise to pay to the order of Cramer and Blohme, forty-four hundred dollars at any city bank. Value received. Due July 19-22.

"H. BULWINKLE & Co."

Indorsed as follows:—

"Pay A. Bequest, without recourse.

"CRAMER AND BLOHME

"A. BEQUEST."

Written across the face, "Paid July 22, 1884."

A few days after the note was given, in removing the corn, it was discovered that some of the sacks were damaged. Immediate notice was given to the defendants, but as they refused to correct the matter, or to have anything to do with it, the corn was "surveyed" by two gentlemen, at the request of the "Merchants' Exchange," and 1,470 sacks were found to contain corn in "a damp, blue-eyed, and musty condition." This damaged corn was sold at auction, and brought less than the price of good corn of the same kind by \$1,188.70. In the mean time, and before the note fell due, the defendants transferred it, and as the defense of unsoundness of the corn could not be made to it in the hands of an innocent holder before due, the plaintiffs paid it, and brought this action for the damages sustained.

The cause came on for trial before Judge Kershaw and a jury. A witness, one of the defendants, was asked whether they (the defendants) contracted in their individual capacity, or in what capacity. The plaintiffs objected to the question, claiming that parol testimony could not be offered to alter the written contract. The judge admitted the parol evidence, saying: "I do not regard this paper, which is a mere memorandum of contract taken down at the time, as precluding testimony as to the conversation between the parties, which might, in any way, throw light on the contract they were making. If these parties knew from any source, at the time that the paper was made, that they were actually dealing with the defendants as agents, I think it can be shown as part of the *res gestæ*," etc. The testimony being admitted, the jury, under the charge of the judge, found for the defendants. The plaintiffs appeal upon the following exceptions:—

"1. That his honor committed error in ruling that the paper

or contract sued on was a mere memorandum of contract, and did not preclude testimony as to conversations between the parties which might, in any way, throw light on the contract or the nature of the contract they were making. And that if the plaintiffs knew, from any source, at the time that paper was made, that they were dealing with the defendants as agents, it could be shown as part of the *res gestæ*.

"2. Because his honor ruled that if in this case there was a clear understanding between the parties that defendants were acting as agents, such understanding was not excluded by that paper.

"3. Because his honor admitted parol evidence on behalf of defendants, after objection thereto, as to conversations between the parties tending to throw light on the contract, or nature of the contract, they were making.

"4. Because his honor admitted parol testimony on behalf of defendants, tending to show that defendants were dealing as agents and not as principals in signing the written contract sued on by plaintiffs.

"5. Because his honor admitted parol testimony on behalf of defendants, tending to show in what character defendants were contracting, whether as agents or principals, when they signed the contract or writing sued on and put in evidence by plaintiffs.

"6. Because his honor erred in instructing the jury as follows: 'If the jury find that the defendants, or either of them, signed the written contract offered in evidence by the plaintiffs, they are personally bound by said contract, unless it was distinctly understood by both parties that the defendants were not to be personally liable for defects in the article purchased.'"

We agree with the circuit judge that in this state, as to personal property, the rule of law is, that "sound price requires sound property," and the contract for the corn must be read as if these words were added, "corn warranted to be sound." A part of the corn turned out to be "unsound," and it would seem that the plaintiffs are entitled to redress on the warranty, unless they in some way waived their rights. Something was said in the case about the plaintiffs having accepted the corn for themselves after an examination, but as there is no reference to that subject in the exceptions, the matter of course is not now before us.

As we understand it, the sole question in the case is as to

who is liable, — whether the defendants, who sold the corn, signed the agreement, and took the note of plaintiffs, and realized upon it in their own name, had the right at the trial to introduce parol testimony tending to show that they were not acting as principals, but as agents of Robert Turner and Son of Baltimore, and the contract of plaintiffs having been made with Turner and Son through them, they are not liable individually. The question as to the admissibility of the evidence seems to have been considered in two aspects: 1. Whether the paper offered as the agreement was such a contract in writing as to be within the rule which excludes parol testimony; and if so, 2. Whether the judge erred in charging the jury "that the defendants were not liable if it was distinctly understood by both parties that the defendants were not to be personally liable for defects in the article sold."

All the authorities agree that, as a general and most inflexible rule of evidence, "whenever written instruments are appointed, either by the requirements of the law or by the compact of parties, to be the depositories and memorials of truth, any other evidence is excluded from being used, either as a substitute for such instruments or to contradict or alter them. This is a matter both of principle and policy": Starkie on Evidence, 648. This seems very plain, but the application of the rule is not always free from difficulty. In the infinite combination of circumstances cases arise which seem exceptions, but when clearly examined, are found not to fall within the principle. As, for example, it may happen that the written instrument does not purport to cover the whole field of contract, and is not intended to be the "depository" of the whole agreement, but only one branch of it. In such case, the whole contract may be proved by parol without touching the principle, — the object being not to add to or alter the written instrument, but to show the whole agreement of which the writing is only a part. *Kaphan v. Ryan*, 16 S. C. 360, is an example of this class, where the court were "not called on to give construction to the note and mortgage, but to determine, from the evidence, for what purpose they (as executed) were to be used," etc. Here the writing covers the whole field, — stating who are the parties, and what the consideration and the price, in condensed form, but with exhaustive particularity.

Sometimes the "written instrument" does not state specifically the consideration, as where a note says generally "for

value received." There is a class of such cases, where the consideration may be inquired into; and in that way matter may get in by parol, "which does not necessarily tend to change the terms of the note, although by showing the true consideration upon which it was given, it may control the recovery upon the note": See *McGrath and Byrum v. Barnes*, 13 S. C. 332, 36 Am. Rep. 687, where the court reviewed our cases upon the subject, and the former chief justice (Willard) endeavored to reconcile them on the distinction here indicated. In that case it was held that "when an executor gave his promissory note for the payment of money, which was expressed to be the amount due by his testator's estate for medical services rendered, most of which during last illness, parol evidence of a contemporaneous agreement that the note was to be paid only upon a certain condition (that the probate judge would pass the account) is incompetent." In the case before us, there cannot be the slightest doubt that the consideration was as stated in the instrument.

There is no doubt that a mere receipt, although in writing, may be explained by parol; but that goes on the ground that a receipt does not necessarily import a contract. As was stated in the case of *Heath v. Steele*, 9 S. C. 92: "In itself, a receipt does not express the terms of any contract or writing of the minds of the parties between whom it passes, but merely evidences, by way of admission, the fact stated in it." See *Moffatt v. Hardin*, 22 Id. 9; 1 Greenl. Ev., sec. 305.

But assuming that this case does not come within any of the seeming exceptions above indicated, it is urged that the paper was too informal and *ex parte* to amount to a contract, but must be considered as a "mere memorandum of a contract," and therefore not such "a written instrument" as to come within the rule as to the exclusion of parol evidence. Most assuredly a simple bill of parcels is not a contract, for the very good reason that it lacks the essential element of agreement, being only the statement of a fact,—a memorandum,—“a note to help the memory”; as, for instance, the bill for the price of the corn rendered in this case was a mere memorandum. But a contract is a promise from one to another, either made in fact or created by the law, to do or to refrain from doing some lawful thing: Bishop on Contracts, sec. 1. There is no particular form required, the only requirement being that it must contain the contract of the parties, and be definite and free from ambiguity. We can well under-

stand how, in the hurry of business, parties would substitute condensed forms for regularly drawn out covenants or agreements. The defendants were offering corn for sale, to come by a vessel; the plaintiffs agreed to purchase a lot, and the defendants committed the agreement to writing, thus: "May 17. Sold to H. Bulwinkle & Co. (. . . corn, etc.) Schooner shipment, payable on arrival. (Signed) Cramer and Blohme." Why was that not a complete contract? It is said the plaintiffs did not sign it. The whole case shows that it was not *ex parte*, but expressed the contract of both parties. We think it is not unusual, in a certain class of agreements, to be signed only by one party; as in the case of an ordinary note, the terms of which are binding upon both parties. Suppose the defendants had offered the corn for sale at public auction, and upon a lot being purchased by the plaintiffs at a certain price, the defendants had made upon their sale-book the same entry precisely as they made in this case: "Sold, etc., to Bulwinkle & Co.,"—would they not be liable upon it as their contract? The research of the plaintiffs' attorney enabled him to furnish the court with references to several cases which seem to conclude this.

In *Meyer v. Everth*, 4 Camp. 22, the action was on a contract in these words: "50 hogsheads of Hambro's sugar loaves at 155s., free on board of a British ship. Acceptance at 70 days." Lord Ellenborough held that it was a contract, and refused to permit parol testimony tending to show that when the sugar was purchased, a sample was exhibited, saying: "When the sale note is silent as to the sample, I cannot permit it to be incorporated into the contract. This would amount to an admission of parol evidence to contradict a written document," etc.

In *Powell v. Edmunds*, 12 East, 10, the action was on a sale note in these words: "April, 1806. I agree to become the purchaser of lot the first (timber trees) at £700, and agree to fulfill the conditions of sale. (Signed) A. Edmunds." At the trial an effort was made to show, by parol testimony, a warranty as to quantity by the auctioneer, but the evidence was rejected, the court saying: "There is no doubt that the parol evidence was properly rejected. The purchaser ought to have had it reduced into writing at the time, if the representation then made as to the quantity swayed him to bid for the lot. If the parol testimony were admissible in this case, I know of no instance where a party may not, by parol testimony, super-

add any term to a written agreement, which would be setting aside all written contracts, and rendering them of no effect," etc.

In *Smith v. Jeffries*, 15 Mees. & W. 560, the terms were: "I hereby agree to sell Mr. Smith, of Tanner Hill, Deptford, sixty tons of Ware potatoes, at F5 per ton, and for which he has given me a bill for F250 for three months, and is to give F50 cash on Friday next. (Signed) Samuel Jeffries." It appeared that in the neighborhood three qualities of potatoes were known as Wares, and the effort was to show by parol that the contract was for a particular kind of Wares. Held, "that the evidence ought not to have been received. It went to vary and limit the contract between the parties."

In *Greaves v. Ashlin*, 3 Camp. 426, the words were: "Sold to John Greaves 50 quarters of oats, at 45s. 6d. per quarter, out of 175 quarters. (Signed) I. Stevenson, for I. Ashlin." The defendant attempted to prove that his agent, Stevenson, had verbally made it a condition of sale that the plaintiff should take away the oats immediately, and had abated 6d. per quarter of the price originally offered in expectation of his agreeing to do so. The court held that "it was not competent to the defendant to give such evidence, as it materially varied the contract, which had been reduced into writing." In each of the two last cases cited, the paper was signed only by one of the contracting parties, and the action was brought by the party who had not signed it. See also *McClanaghan v. Hine*, 2 Strob. 122, and *Gibson v. Watts*, 1 McCord Eq. 490.

We think the paper proved in this case was a contract in writing of both parties, within the rule as to the exclusion of parol evidence.

But it is insisted that while this may be so as to what may be called the terms of the paper,—the quality of the article, consideration, time of payment, etc.,—yet parol testimony was admissible tending to show that the defendants, Cramer and Blohme, in selling the corn, committing the agreement to writing, taking the note and realizing upon it in their own name, were acting, not as the papers represented, but as agents of a house in Baltimore, and that the plaintiffs contracted with said house, through Cramer and Blohme, as their agents. Is not the signature to a contract in writing, showing who made it and in what character, a part, and a very important part, of that contract? We are unable to see any good reason why this part should not be protected from alteration

or addition as well as any other part of the contract in writing. It seems to us that when the defendant signed the contract in their own names, that became a part of it, and could not be altered by parol, so as to add to the signature, "as agents of Robert Turner and Son, of Baltimore." "A person contracting as agent will be personally liable, whether he is known to be an agent or not, in all cases where he makes the contract in his own name. . . . If an agent selling goods as bought of him, the agent, he would be personally liable for a failure to deliver the goods": Story on Agency, 269; see also sec. 219; Benjamin on Sales, sec. 219; *Higgins v. Senior*, 8 Mees. & W. 834; *Nash v. Towne*, 5 Wall. 703; and *Jones v. Littledale*, 6 Ad. & E. 486; in which last case cited Lord Chief Justice Denman said: "There is no doubt that evidence is admissible on behalf of one of the contracting parties to show that the other was agent only, though contracting in his own name, and so fix the real principal; but it is clear that if the agent contracts in such a form as to make himself personally responsible, he cannot afterwards, whether his principal were or were not known at the time of the contract, relieve himself from that responsibility. In this case there is no contract signed by the sellers, so as to satisfy the statute of frauds until the invoice, by which the defendants represent themselves to be the sellers; and we think they are conclusively bound by that representation. Their object in so representing was, as appeared by the evidence of custom, to secure the passing of the money through their hands, and to prevent its being paid to their principals, but in so doing they have made themselves responsible," etc.

In the case from Wallace, Mr. Justice Clifford said: "Parol evidence can never be admitted for the purpose of exonerating an agent, who has entered into a written contract in which he appears as principal, even though he should propose to show, if allowed, that he disclosed his agency and mentioned the name of his principal at the time the contract was executed. Where a simple contract other than a bill or note is made by an agent, the principal whom he represents may, in general, maintain an action upon it in his own name, and parol evidence is admissible, although the contract is in writing, to show that the person named in the contract was an agent, and that he was acting for his principal. Such evidence, says Baron Parke, does not deny that the contract binds those whom on its face it purports to bind, but shows that it also

binds another, and that principle has been fully adopted by this court"; citing numerous authorities.

The judgment of this court is, that the judgment of the circuit court be reversed, and the cause remanded to the circuit court for a new trial.

SALES—IMPLIED WARRANTY. — An implied warranty of soundness exists in sales of merchandise: *Blackwood v. Outting Pkg. Co.*, 76 Cal. 212; 9 Am. St. Rep. 199, and cases collected in note 206, 207.

PAROL TESTIMONY TO VARY WRITTEN CONTRACTS: See note to *Sullivan v. Lear*, 11 Am. St. Rep. 393-395; note to *Appeal of Cornwall etc. R. R. Co.*, 11 Id. 893, 894; note to *Smith v. Clews*, 11 Id. 633; also compare note to *Finlayson v. Finlayson*, 11 Id. 844.

PAROL TESTIMONY TO VARY RECEIPTS is always admissible: Note to *Sullivan v. Lear*, 11 Am. St. Rep. 393, 394.

PAROL TESTIMONY, WHETHER ADMISSIBLE TO SHOW that an agent signing a contract in his own name was acting for his principal: See *Richmond etc. R. R. Co. v. Sneed*, 19 Gratt. 354; 100 Am. Dec. 670, and note 678; compare *Turner v. Garlington*, 27 S. C. 107; *ante*, p. 629, and note.

BRIDGER v. ASHEVILLE AND SPARTANBURG R. R. Co.

[27 SOUTH CAROLINA, 456.]

NEGLIGENCE — EVIDENCE THAT PREVIOUS ACCIDENTS had happened at the same turn-table at which plaintiff's son was injured is not admissible in an action to recover for damages for injuries sustained by such son from a turn-table, unless defendant is shown to have had knowledge of such accidents.

INJURIES TO PLAINTIFF'S SON — MEASURE OF DAMAGES. — In an action by a father against one by whose turn-table it is claimed the plaintiff's son was injured, the father cannot recover the value of his own services as a nurse to his son, and his earnings as agent of a publishing company.

FORMER JUDGMENT, WHEN INADMISSIBLE. — In an action by a father to recover damages occasioned by the injury of his minor son through the negligence of the defendants, a judgment in favor of the son for his damages resulting from the same accident is inadmissible. Such judgment is *res inter alios acta*.

EVIDENCE — CUSTOM OF WELL-REGULATED RAILROADS IN REFERENCE TO LOOKING AND GUARDING THEIR TURN-TABLES may be received in evidence in an action for injuries occasioned by leaving a turn-table unguarded, especially if the plaintiff had undertaken to prove that one railroad did in fact lock its turn-table.

EVIDENCE AS TO WHETHER PLAINTIFF THOUGHT IT POSSIBLE that his child could have visited a turn-table without his knowledge is properly rejected in an action to recover damages for injuries to one of the plaintiff's children from an unguarded turn-table.

CONFLICT OF LAWS — IF AN INJURY IS SUFFERED IN ONE STATE, AND AN ACTION IS BROUGHT IN ANOTHER for damages resulting therefrom, the law of the former state, whether statutory or otherwise, determines the

plaintiff's right to recover. If an action could not have been sustained in the state where the injury was suffered, none is maintainable elsewhere.

QUESTION FOR JURY. — **WHETHER A CHILD'S CAPACITY WAS SUCH THAT HE MIGHT BE CHARGEABLE WITH CONTRIBUTORY NEGLIGENCE** is properly left to the jury, when he was not so young as to require the judge to say that he could not contribute to his injury, nor so old that the presumption must exist, in the absence of evidence to the contrary, that he must suffer the consequences of his own neglect.

CONTRIBUTORY NEGLIGENCE. — **EVIDENCE AS TO CAUTION, PRUDENCE, RECKLESSNESS, OR IMPETUOSITY OF A BOY IS INADMISSIBLE** to excuse his contributory negligence.

PRACTICE. — **ON MOTION FOR A NEW TRIAL, EVIDENCE WILL NOT BE RECEIVED TO SHOW THAT A JUDGE HAD FORMED AN OPINION** before hearing the case.

J. S. R. Thomson, and Bigby and Dorsey, for the appellant.

Duncan and Sanders, contra.

SIMPSON, C. J. In this action the plaintiff sought to recover damages for injuries inflicted upon his son, a boy of tender years, by negligence of the defendant corporation, as alleged. The injury complained of was done in North Carolina, county of Henderson, at a turn-table of defendant. The defense, 1. Denied the negligence; and 2. Relied on contributory negligence on the part of the child. The verdict was for the defendant, and the plaintiff has appealed upon thirty exceptions.

These exceptions, or at least so many of them as raise questions for our consideration, may be grouped under four heads, as follows: 1. Those that complain of error in the circuit judge's ruling upon the competency of certain testimony offered, embracing exceptions from one to thirteen, inclusive; 2. Those that complain that his honor refused to charge, without qualification, certain requests of plaintiff, embracing exceptions 17, 18, 19, 20, and 21; 3. Those complaining of his honor's charge and refusal to charge in reference to the application of the law of North Carolina in a case of this kind, — exceptions 22, 23, and 26; and 4. Those complaining of his honor's charge that the age and intelligence of the boy were the tests of his capacity to commit contributory negligence, excluding questions of prudence, childish propensities, and impulses.

Under the first group we find the first allegation of error to be, that his honor allowed one Dr. Allen to testify "that he thought the boy did not act prudently in going on the turn-table." In turning to the brief, folio 21, it will be seen that

his honor excluded this testimony. Upon its being offered, the plaintiff objected, and after discussion the objection was sustained. The second allegation is, that his honor erroneously excluded the testimony of one Crossby as to the judgment and discretion of the boy, especially as to danger. His honor excluded this testimony, upon the ground that the only pertinent inquiry upon this subject was as to the capacity and intelligence of the boy, his capacity to know and understand the danger, and not as to his prudence or recklessness in encountering it. We think his honor was right in his ruling here, for reasons to be given under the discussion of the fourth and last group of exceptions, which involve substantially the same principle. The third allegation of error is the same in substance as the second.

The fourth complains that his honor excluded the testimony of Mrs. McConnell of former accidents upon the turn-table. This testimony was excluded unless knowledge of said accidents was first brought home to the defendant, which was not done. One important rule of evidence is, that testimony, to be competent, must be pertinent to the issue. The issue here was negligence. We do not see how former accidents happening at this turn-table could be pertinent to said issue, in the absence of all knowledge thereof by the defendant.

The fifth objects to the exclusion of Charles C. Haskell's testimony as to the monthly earnings of the plaintiff. The plaintiff at the time his son was injured was in the employment of the Henry Hill Publishing Company as agent for the sale of books, and the testimony of Haskell was intended to show how much he earned monthly at this business, the plaintiff claiming that he should recover from the defendant the value of his son's services, the value of his own services as a nurse to his son, and his monthly earnings as agent of the publishing company, which he alleged that he lost in consequence of being compelled to nurse and attend to his son while injured, or at least the difference between what he could have earned and the amount of four hundred dollars, which it seems he paid some one to attend to his agency. This latter item his honor ruled out, and therefore excluded the testimony of Haskell upon this point, saying, however, "that if the plaintiff could recover for his loss of time in his agency, it could not be speculative and uncertain wages, but must be contract wages," of which there was no evidence in the case.

We think the general rule in cases of this kind is that

master and servant, which would include necessary expenses of medical attention, nursing, etc., and the services of the injured party. His honor seemed inclined to extend this rule here in view of the fact that it was proper that the father should become the nurse of his injured boy, and if contract monthly wages had been lost by the father, under his honor's ruling they might have been proved, but speculative and altogether uncertain earnings he excluded. We think his honor was as liberal to the plaintiff as the law allowed. The sixth is the same in substance as the fifth.

7. There had been a previous action on account of this injury in behalf of the boy, the plaintiff here, his father being his guardian *ad litem*, which resulted in a verdict of five thousand dollars for the plaintiff. The record in said case was offered here by the plaintiff; it was excluded, and this is the ground of the seventh allegation of error. The rule of evidence, *supra*, which requires that the testimony offered in a case should be pertinent to the issue, we think excluded this record. It was *res inter alios acta*, and had no application or pertinency to the case in hand, and therefore his honor's ruling was correct.

The eighth complains of the exclusion of certain questions to witness Grambling tending to show enmity between him and the plaintiff. We do not find in the brief that these questions were excluded; on the contrary, Grambling seems to have testified fully, and without objection.

The ninth complains of the admission of testimony from Divine, Bass, and Bernard as to customs of well-regulated railroads in reference to locking and guarding their turntables. His honor admitted this testimony, saying, in substance, at the same time, that while it was no defense to say that other railroads did the same thing, inasmuch as railroads have no right to make rules of negligence, yet the question being one of negligence, this fact might be an element in that question, especially in this case, where the plaintiff had undertaken to prove that one railroad company did in fact lock its turn-table. And in reply to this testimony he held it competent. With this qualification, there was no error.

The tenth, eleventh, twelfth, and thirteenth complain that his honor refused to permit the plaintiff to testify whether he thought it possible that his children could have visited the turn-table without his knowledge; whether his children had mentioned to him of any such visit; when was the first time

he had heard of such visit, and whether, if they had visited said turn-table before the evening of the accident, he or his wife would have known it. These questions were properly excluded, as they mostly called for opinions, hearsay, and inferences, none of which, under the rules of evidence, were admissible from the witness. The testimony of witnesses, as a general rule, is confined to facts, with some exceptions, not applicable, however, here.

The fourteenth is the same in substance as the second and third, *supra*.

This brings us to the second group of exceptions, in which complaint is made that his honor charged the requests of plaintiff made in several forms: "That children of tender years could only be held responsible for contributory negligence according to their age, capacity, and development," as good law, unless the jury came to the conclusion that the law of North Carolina fixed an age at which they were to be held responsible as adults. The appellant objects to the qualification and proviso as to the North Carolina law. In other words, these exceptions complain that his honor held that the North Carolina law was applicable to the case, and if that law had modified the common law, it should control the jury. This question is the same as that involved in the third group of exceptions. So that, without stating the exceptions *seriatim* in either of these groups, we will now consider this single question, upon which they all depend.

His honor held that in one sense all law in North Carolina, as well as in this state, was statute law, inasmuch as the body of the common law had been adopted by statute in both; but independent of this, that the decisions of the highest tribunal in North Carolina constituted the law there, just as much as if enacted by the legislature, and therefore it made no difference in this case how it had been declared law in North Carolina that children of a certain age should be regarded legally capable of contributory negligence, yet if such a law had been announced, either by decisions in the court of last resort or by act of legislation, it was the law of the case then before the court, although it might be contrary to law of South Carolina. We think his honor's ruling upon this subject was correct. The cause of action arose in North Carolina. The injury was inflicted there, and if the parties had remained in that state, and brought action there, they would have been compelled to stand or fall by the law there. And we cannot see, upon prin-

ciple, how stepping over the line could give the plaintiff a new and altogether enlarged cause of action,—in fact, a cause of action which he did not have before, and therefore which he could not have enforced in the tribunals having jurisdiction of the matter at its origin. All this is upon the assumption that the injured boy was over the age fixed by the law of North Carolina, and that he contributed to his own injury. In such a case, the plaintiff would have had no cause of action in North Carolina, and having no cause in North Carolina, where the injury was inflicted, he could have none here: See cases of *Atlanta etc. R. R. Co. v. Tanner*, 68 Ga. 384; *Atchison etc. R. R. Co. v. Moore*, 29 Kan. 642 (452).

His honor charged generally that the test of the boy's capacity for contributory negligence was his age, his intelligence, his ability to know his surroundings, and the danger of what he was doing with the turn-table; and if the jury found as matter of fact that that boy had sufficient intelligence, etc., to know and understand these things, all of which was for them, that then he would assume to charge that such one was subject to the rules of ordinary care and diligence, and failing to exercise the same would defeat the right of the plaintiff to recover here, if he contributed to his injury. This general charge is made the cause of the exceptions embraced in the fourth group, *supra*. The injured boy does not seem to have been so young as to have required the judge to say that he could not contribute to his injury. Nor was he of that age where the presumption would necessarily arise in the absence of testimony to the contrary that he could. Under these circumstances his honor left the question very properly to the jury, resting it upon the intelligence and capacity of the boy, as was done in the former case of *Edgar Bridger* against this defendant; provided, however, that the North Carolina law did not establish a different principle by fixing a certain age, which the judge also left to the jury, with a very strong intimation that it had not, of which of course the appellant has no cause of complaint. We find no warrant of law which would have authorized the judge to extend the principle so as to have allowed testimony as to the caution, prudence, recklessness, or impetuosity of the boy as an excuse for contributory negligence, notwithstanding his intelligence and capacity should have taught him better. We do not think the cases cited and relied on by appellant controvert this principle.

The fifteenth exception complains that his honor, on the

motion for new trial, refused to allow testimony to show that a juror had formed an opinion before hearing the case. We think his honor's ruling here is sustained by the principles laid down in the cases referred to by the respondent, to wit: *McCarty v. McCarty*, 4 Rich. 594; *Pulaski & Co. v. Ward & Co.*, 2 Id. 122; *Josey v. Railroad Co.*, 12 Id. 186.

It is the judgment of this court that the judgment of the circuit court be affirmed.

NEGLIGENCE — WHEN AND WHEN NOT A QUESTION FOR THE JURY: See *Arnold v. Pennsylvania R. R. Co.*, 115 Pa. St. 135; 2 Am. St. Rep. 542, and the numerous cases collected in note 545, 546; *West Mahanoy Township v. Watson*, 116 Pa. St. 344; 2 Am. St. Rep. 604, and note 607, 608; *Wabash etc. R'y Co. v. Locke*, 112 Ind. 404; 2 Am. St. Rep. 193; *South Side P. R'y Co. v. Trick*, 117 Pa. St. 390; 2 Am. St. Rep. 672; *Wallace v. Western N. C. R. R. Co.*, 98 N. C. 494; 2 Am. St. Rep. 346, and note 349; *Reagan v. St. Louis etc. R'y Co.*, 93 Mo. 348; 3 Am. St. Rep. 542; *Indianapolis etc. R'y Co. v. Watson*, 114 Ind. 20; 5 Am. St. Rep. 578; *Alabama G. S. R. R. Co. v. Arnold*, 84 Ala. 159; 5 Am. St. Rep. 354; *Seefeld v. Chicago etc. R. R. Co.*, 70 Wis. 216; 5 Am. St. Rep. 168, and cases collected in note 174; *Selinas v. Vermont S. Agr. Soc.*, 60 Vt. 249; 6 Am. St. Rep. 114; *Nugent v. Boston etc. R. R. Co.*, 80 Me. 62; 6 Am. St. Rep. 151; *Delaware etc. R. R. Co. v. Cadow*, 120 Pa. St. 559; 6 Am. St. Rep. 730; *Schmidt v. McGill*, 120 Pa. St. 405; 6 Am. St. Rep. 713; *Woodward v. Shumpp*, 120 Pa. St. 458; 6 Am. St. Rep. 716; *City R'y Co. v. Lee*, 50 N. J. L. 435; 7 Am. St. Rep. 798, and note 801, 802; *Harris v. Township of Clinton*, 64 Mich. 447; 8 Am. St. Rep. 842, and note 849, 850; *M'ynning v. Detroit etc. R. R. Co.*, 64 Mich. 93; 8 Am. St. Rep. 804, and note 813; *Hunter v. Cooperstown etc. R. R. Co.*, 112 N. Y. 871; 8 Am. St. Rep. 752; *Rolseth v. Smith*, 38 Minn. 14; 8 Am. St. Rep. 637, and note 639; *Baltimore etc. R. R. Co. v. Kane*, 69 Md. 11; 9 Am. St. Rep. 387; *Dickson v. Hollister*, 123 Pa. St. 421; 10 Am. St. Rep. 533; *East Line etc. R. R. Co. v. Scott*, 71 Tex. 703; 10 Am. St. Rep. 804, and note 812; *Parsons v. New York etc. R. R. Co.*, 113 N. Y. 355; 10 Am. St. Rep. 451; *Henry v. Sioux City etc. R. R. Co.*, 75 Iowa, 84; 9 Am. St. Rep. 457, and note 461; *Cincinnati etc. R. R. Co. v. McMullen*, 117 Ind. 439; 10 Am. St. Rep. 67; *Chicago etc. R'y Co. v. Robinson*, 127 Ill. 9; 11 Am. St. Rep. 87; *Village of J. v. Chapman*, 127 Ill. 438; 11 Am. St. Rep. 136; *Killian v. Augusta etc. R. R. Co.*, 79 Ga. 234; 11 Am. St. Rep. 410; *Connolly v. Knickerbocker Ice Co.*, 114 N. Y. 104; 11 Am. St. Rep. 617; *Durbin v. Oregon etc. R. R. & Nav. Co.*, 17 Or. 5; 11 Am. St. Rep. 778.

NEGLIGENCE OF CHILD. — Whether a child used such care in crossing a railroad track and in ascertaining the danger that attended his act as would be incumbent upon one of his age, is a question of fact for the jury: *Houston etc. R'y Co. v. Booser*, 70 Tex. 530; 8 Am. St. Rep. 615; *Eswin v. St. Louis etc. R'y Co.*, 96 Mo. 290.

CONTRIBUTORY NEGLIGENCE OF A PARENT will not defeat a recovery for injuries to a child, if the child was using all the care which the occasion required: *Chicago etc. R'y Co. v. Robinson*, 127 Ill. 9; 11 Am. St. Rep. 87, and note 90. A child of immature age is not held to any greater degree of care than might reasonably be expected of one of his age: *Moebus v. Herrmann*, 108 N. Y. 249; 2 Am. St. Rep. 440; *Houston etc. R'y Co. v. Booser*, 70 Tex. 530;

8 Am. St. Rep. 615; compare *Schwenk v. Kehler*, 122 Pa. St. 67; 9 Am. St. Rep. 70, and note 74; compare *Kerr v. Minnesota etc. Ass'n*, 39 Minn. 174; 12 Am. St. Rep. 631, and note.

CONTRIBUTORY NEGLIGENCE, INSTANCES OF WHAT IS: See note to *Columbus etc. R'y Co. v. Bridges*, 11 Am. St. Rep. 66; *Durbin v. Oregon R. R. & Nav. Co.*, 11 Id. 786; note to *Virginia etc. R'y Co. v. White*, 10 Id. 882; note to *Harris v. Township of Clinton*, 8 Id. 850, 851; *Brooks v. Taylor*, 65 Mich. 208; *Palmer v. Pennsylvania Co.*, 111 N. Y. 488; *Strand v. Chicago etc. R'y Co.*, 64 Mich. 216; *Heaney v. Long Island etc. R. R. Co.*, 112 N. Y. 122; *Eswein v. St. Louis etc. R'y Co.*, 96 Mo. 290; *Pates v. Adams*, 37 Kan. 133; *Tilley v. St. Louis etc. R'y Co.*, 49 Ark. 535; and for instance of what is not contributory negligence, see *Powers v. Craig*, 22 Neb. 621.

CONFLICT OF LAWS.—An action of tort for an injury to a person or his property cannot be maintained unless the act which causes the injury was punishable or actionable by the law of the place where it was committed: *Carter v. Goode*, 50 Ark. 155; compare note to *Buckles v. Eilers*, 37 Am. Rep. 160-162.

STATE v. BYRD

[28 SOUTH CAROLINA, 18.]

CRIMINAL LAW—PERJURY.—In charging perjury under the South Carolina statute, it is not necessary to allege that the false swearing was material to the issue. It is sufficient to aver that the oath was required by law, administered by one authorized to do so, and that it was willfully and knowingly false, and when its materiality is not alleged it need not be proved.

CRIMINAL LAW—EVIDENCE.—Where the question of the location of a defendant at a particular time materially affects his guilt or innocence evidence as to that question is admissible.

CRIMINAL LAW—PERJURY.—INDICTMENT for perjury is not defective because it does not charge that the proceeding in which the crime was committed, before a trial justice, "was commenced on information under oath."

James P. Carey, for the appellant.

J. L. Orr, contra.

McGOWAN, J. The defendant was indicted for perjury. The indictment contained two counts. The first charged that the said Albert Byrd, being sworn as aforesaid (before John R. Gossett, Esq., trial justice), not having the fear of God, etc., "then and there, upon his oath aforesaid, before the said John R. Gossett, Esq., upon a certain trial, entitled 'The State against Albert Byrd. Offense: Refusal to work the roads,'—falsely, corruptly, knowingly, willfully, and maliciously did say, depose, swear, and give information (amongst other things), in substance and to the effect following, that is to say, this informant (meaning the said Albert Byrd), upon his

oath, sayeth: 'I did not go in opposite direction from Greenville on the morning of the 14th of August. I started to Greenville on the morning of 14th, between seven and eight o'clock,' whereas, in truth and in fact, the said Albert Byrd did, on the morning of the fourteenth day of August, in the year of our Lord one thousand eight hundred and eighty-five, go in an opposite direction from Greenville, and did not start to Greenville on the said morning, etc.,—contrary to the form of the statute in such case made, etc."

The second count charged: "That upon the hearing of the trial before the said John R. Gossett, Esq., as aforesaid, it became and was a material question whether the said Albert Byrd was exempt from road duty by reason of his absence to Greenville on the morning of 14th of August, 1885, and the continuation of such absence during the remainder of said day, the jurors aforesaid do say that the said Albert Byrd, on the nineteenth day, etc., before the said John R. Gossett, Esq., by his own act and consent, and of his own wicked and corrupt mind, in manner and form aforesaid, falsely, wickedly, willfully, and corruptly did commit willful and corrupt perjury, to the evil and pernicious example of all others in like case offending, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state aforesaid," etc.

The judge held that the defendant was indicted under our acts of assembly, and charged the jury that the only inquiry for them was, whether the defendant "knowingly and willfully swore falsely before an officer required by law to administer oaths. Did he swear falsely in the way in which the trial justice says he did, and the way in which the indictment charges? If he did, the case is made out; if he did not, the case is not made out, and he is not guilty," etc. The jury found the defendant guilty, and he appeals to this court upon the following grounds:—

"1. Because the circuit judge erred in refusing to charge 'that if the jury believed, from the testimony, that the defendant in good faith attended the United States court on August 14, 1885, to answer there for a criminal charge, the particular direction which he started or the particular hour is immaterial, and they should acquit him.'

"2. Because the judge erred in instructing the jury that the defendant was not indicted under the common law, but under our acts of assembly.

"3. Because the judge erred in instructing the jury that the only inquiry for them was, Has the defendant knowingly and willfully sworn falsely before an officer required by law to administer oaths?—whereas he should have qualified said instruction by stating that the facts sworn to must be material to the issue pending before the said officer.

"4. Because his honor erred in overruling the defendant's motion in arrest of judgment, on the following grounds: 1. That the indictment is fatally defective, in that it does not allege that the proceeding before the trial justice was commenced on information under oath; 2. That the indictment does not state an offense under the law."

It appears, from the request to charge, and the exceptions, as well as from the grounds taken in arrest of judgment, that the real complaint of the defendant is, that the conviction was error, for the reason that his sworn statement in the proceedings against him for not working on the road as to his starting that morning in the direction of Greenville, and at an early hour, was immaterial to the issue then being tried, as to whether he was exempt that day from working the roads; that even if the statement was, as alleged, false, he might still have gone to Greenville, and therefore the testimony, although false, was not sufficient to support a conviction for perjury. Possibly the statement that he left that morning at an early hour in the direction of Greenville, taken alone, might not be sufficient to establish conclusively the fact that he went to Greenville that day so as to excuse him from road duty; but it seems to us that the statement was made for that purpose, and it certainly tended in that way, and was sworn evidence calculated to disprove the charge as to his refusal to work on the roads. We do not think that this false testimony can be said to have been entirely immaterial to the question in issue. The second count in the indictment charged expressly that the oath in the proceedings for default in not working the roads affected the material question, whether the said defendant was exempt from road duty by reason of his absence at Greenville. But it is not in express terms so alleged in the first count; and as the presiding judge held that the defendant was indicted under our acts of the general assembly, and limited his charge to that view, we think the defendant is entitled to have the inquiry on appeal confined to the first count, which manifestly was intended to charge the statutory offense.

There can be no doubt that perjury was always an offense at

the common law. Hawkins defined it as follows: "Perjury, by the common law, seemeth to be a willful false oath by one who, being lawfully required to depose the truth in any proceeding in a course of justice, swears absolutely in a matter of some consequence to the point in question, whether he be believed or not," etc.: 2 Bishop's Criminal Law, sec. 1015, and notes. It seems to have been necessary that it should appear on the face of the indictment that the false oath was material, or, as Hawkins puts it, "a matter of some consequence to the point in question." If the materiality was expressly averred in the indictment, it was necessary to prove it. But it was not necessary that it should be expressly alleged, if it otherwise appeared that the words were material, "either by the context of the indictment or by their own import": *State v. Hayward*, 1 Nott & McC. 553. It was held that, to be material, it was not necessary that the testimony should be of itself sufficient to produce the wrong result, but it was enough if it was a part or link in a chain of evidence tending to that end: 2 Bishop's Criminal Law, sec. 1032, and authorities.

But in 1833 the legislature of this state passed an "act concerning perjury," which (re-enacted as section 2534 of the General Statutes) provides as follows: "Whoever shall willfully and knowingly swear falsely, in taking any oath required by law, and administered by any person directed or permitted by law to administer such oath, shall be deemed guilty of perjury, and, on conviction, incur the pains and penalties of that offense." It will be observed that there is nothing in this act as to the necessity that the false swearing denounced should be material to the issue in a judicial proceeding. The only requirements are, that the oath shall be required by law, administered by one authorized to do so, and that it was willfully and knowingly false. The judge read this law to the jury, and charged accordingly. The jury rendered a verdict of guilty, and that must be taken as conclusive of the fact that, in the matter indicated, the defendant swore falsely, "willfully, and knowingly."

We do not see that the indictment under the statute was fatally defective because it did not charge that the proceeding before the trial justice "was commenced on information under oath." Express power is given to all trial justices to administer any oath authorized or required by law to be taken, and not directed to be administered by another authority: Gen. Stats., sec. 847. "The indictment need not allege that

the court at which the oath was taken had jurisdiction of the subject-matter of the suit; it is sufficient to allege that the action to which the discount was set up was by summary process": *State v. Farrow*, 10 Rich. 165.

This case is not altogether analogous to that of *State v. Kennerly*, 10 Rich. 154, cited and relied on by the defendant's counsel. In that case there was in reality no indictment under the statute; both counts were held to charge perjury at common law, while in this the first count charged clearly the offense created by the statute. In the case of *Kennerly*, Judge Wardlaw, in delivering the judgment, said: "Either count sufficiently charges a common-law perjury, and the conclusion *cont. form. stat.* may be struck out as surplusage. But the conviction under the common law cannot be sustained, for the jury were instructed that the materiality of the matter falsely sworn to need not be investigated. By the common law the oath must be material to the question depending. It is not necessary that it should be directly material in substance to the very issue pending, for it may be only circumstantially and remotely pertinent; it may only affect the credit to be given to the witness, or serve to aid other more important evidence. If, however, it is wholly foreign to the purpose, perjury cannot grow out of it. The attempt has been made to sustain the conviction, without inquiry into materiality, by the act of 1833. That act is supposed to have introduced a new definition or description of the crime of perjury, according to which it is sufficient to show false swearing in an oath required by law and administered by a competent person, and unnecessary to allege or prove the materiality. Admitting this, the conviction here was wrong, for here the materiality is alleged, and the allegation, although beyond what was necessary, must be proved," etc.

In the case at bar there was no such allegation in the first count, and there was no necessity to make proof of it. Besides, we cannot say that the matter of the oath alleged to be false was wholly immaterial to the issue in which it was made.

The judgment of this court is, that the judgment of the circuit court be affirmed.

PERJURY. — WHAT constitutes the crime, the materiality of the matter falsely sworn to, and the requisites of an indictment therefor: See extended note to *State v. Shupe*, 85 Am. Dec. 438-500. The general rule is, that an indictment for perjury must show the materiality of the matters falsely testified to: *State v. Cunningham*, 116 Ind. 209; *State v. Smith*, 40 Kan. 631;

State v. Wilson, 87 Tenn. 693; *Hicks v. State*, 86 Ala. 30; *People v. Ah Bean*, 77 Cal. 12. But a false statement under oath, to be perjury, must have been deliberately and willfully made with a knowledge that it was false: *Brookins v. State*, 27 Tex. App. 701. An information for perjury is insufficient, where there is no allegation that the false statement was given in any cause, matter, or proceeding before any court, tribunal, public body, or officer: *State v. Ayer*, 40 Kan. 43; compare *Smith v. State*, 27 Tex. App. 50; *Lucas v. State*, 27 Id. 322; *State v. Murphy*, 101 N. C. 697.

FINCH v. FINCH.

[28 SOUTH CAROLINA, 164.]

EXECUTOR'S AND ADMINISTRATOR'S LIABILITY FOR PURCHASES MADE AT OWN SALE. — Where an executor, under directions in the will, sold his testator's property, purchasing part of it himself, and paying therefor in confederate money, which, together with the money realized on the sale, he invested in confederate bonds, which afterwards proved worthless, he is liable to the devisees for the amount of his purchase, especially as he afterwards sold it for gold. The statute (sections 1794 and 1795, General Statutes of South Carolina) authorizes the executor to purchase at his own sale, but makes him liable for the actual value of the property so bought, and requires him to give a bond, with surety, to account for the purchase-money of such property.

Stanyarne Wilson, for the appellants.

Bomar and Simpson, for the respondents.

McGOWAN, J. In 1862, during the late war, Miles A. Finch died, leaving a will which, among other things, declared, in the third clause, as follows: "The remainder of my estate, real and personal, I desire my executor to sell on such terms as he may think will make it bring the most money, collect my notes, all of which, with the cash on hand, I desire shall be equally divided among all my children, share and share alike." The children surviving were Elizabeth, Louis L., Leonora F., and Louisa J. Thereafter, Elizabeth and Leonora F. dying intestate and without issue, Louis L. was appointed administrator of their estates, and he, together with the other surviving child, Louisa L., instituted this proceeding in the court of probate against the defendant, executor, for an account and division of the estate.

The defendant answered, that by order of the then ordinary of Spartanburg County, he sold, on October 24, 1862, the little residue of the estate upon a credit of twelve months; that the sale bill amounted to \$911.36, which was secured by good notes (except \$4.50 paid cash in confederate money), and the notes

paid in confederate money about October or November, 1863; that, under the advice of counsel and the ordinary, he deposited the money with the Confederate States agent at Columbia, and received a "certificate of deposit," for which confederate bonds were afterwards to be substituted; that this investment was the only one that could be made at that time, but the certificate, without any fault of his, became worthless, and that he had in his hands no estate for which he was accountable.

The judge of probate took the testimony, and found as matters of fact that the amount of \$315.36 of the sale bill was for articles purchased by the executor himself at his own sale, among which was a bale of cotton, which he sold for gold after the war at a high price; and he also found that the purchases at the sale of D. G. Harris, \$56, and of L. M. Gentry, \$8.10, making \$64.10, had not been actually paid in confederate money at the time the investment for the even sum of \$900 was made, but on the contrary, that the executor advanced his own confederate money, and collected these accounts in good money after the war. On these facts, the probate judge held that the investment discharged the executor as to everything but his own account for purchases, and also those of Harris and Gentry, as above stated; but for those, reduced according to the scale of depreciation of confederate money, established by act of the legislature, he held the executor chargeable, just as if they had been collected after the war. According to this view, there was due October 8, 1886 (after deducting the costs), the sum of \$361.46, which in equal parts he decreed to the children.

Upon appeal by the defendant to the court of common pleas, Judge Pressley held "that the executor should not have been held responsible for his own purchases, because he had paid for same in confederate securities," and remanded the case to the probate court for the purpose of having the statement recast in accordance with that view, but confirming the decree of the probate court in all other respects. He further ordered that the appellant, Benjamin Finch, have judgment against the respondents for the costs of the appeal.

From this decree the plaintiffs appeal upon the following grounds: 1. That his honor erred in holding that defendant should not be held responsible for his own purchases, and in not holding that he should account for them, as held by the probate judge; 2. That he erred in holding that he ever paid for his purchases; 3. That he erred in charging the plaintiffs,

instead of defendant, with the costs of the action; 4. That he erred in allowing defendant judgment for the costs of the appeal to the court of common pleas.

The relation between these parties was that of trustee and *cestui que trust*. The testator left certain property, to be disposed of in the manner directed by his will, of which the defendant was appointed executor. The testator died during the war, when values were much disturbed, but the will directed that the property should be sold in the manner the executor might think best. He sold it upon a credit of twelve months, and for confederate prices. So far, the executor seems to have acted in accordance with the will; but there was another provision in the will,—that the whole estate should be equally divided among testator's children. That has not been done, and the children have instituted this proceeding, asking an account from the executor; and he claims that when the sale bill fell due he paid it all, including his own purchases, in confederate money, which in turn was invested in confederate securities, and as they became worthless, he has nothing in his hands to be accounted for, and he should be discharged.

The extraordinary financial condition of the country during the late war has given rise to many embarrassing questions, especially in reference to the accountability of fiduciaries, who had trust funds in their hands at that time. So far as the established principles of accountability would allow, the courts have ever shown a disposition to protect such trustees from loss, certainly where it appeared that they had acted in the line of their duty and in good faith. This court has gone as far as equity and justice would countenance in sustaining investments in confederate securities by fiduciaries; but, as we think, without ever overlooking that fundamental principle of accountability, that a trustee shall not be allowed to make profit to himself out of his trust. Such a result—forbidden under any circumstances—would be still more objectionable if allowed to arise out of transactions which took place amidst the general ruin of the period referred to. One of the rules which seems to have been adopted in such cases is, that to sustain a confederate investment it must appear that the money so alleged to have been invested was at the time actually in the hands of the trustee,—not irregularly or illegally, but “rightfully” there; and that it was not available in the due course of administration of his trust: See *Koon v. Munro*, 11 S. C. 140, and 18 Id. 374.

The sale was made during the war, and the notes taken with reference to confederate prices. We suppose, therefore, it was incumbent on the executor to receive confederate money from those purchasers who tendered it in payment. But we do not understand that it was allowable for the executor to charge himself with the sale bill in a lump,—really purchasing the assets with his own confederate money, and investing that for the beneficiaries,—at the same time keeping and collecting the notes after the war. The courts will not sustain on the part of a fiduciary such speculative proceedings; and it was upon this principle that the purchases of Harris and Gentry, which were collected after the war, were not allowed, but were stricken from the investment which purported to cover them.

Then what about the purchases of the executor at his own sale? For many years it was a point much debated in this state, whether a trustee to sell could legally purchase at his own sale, or such attempted purchase was void; but it seems to have been finally settled that “while such a sale was not utterly void, it will be set aside on the application of any one interested, and that without reference to the question whether the sale was fairly conducted, or a full and fair price paid”: See *Black v. Childs*, 14 S. C. 312, and the authorities there cited.

In reference to the purchase of an executor, the law was expressly declared by the act of 1839, and is now contained in sections 1994 and 1995 of the General Statutes, as follows: “It shall be lawful for any executor or administrator to become a purchaser at the sale of the estate of his or her testator or intestate, under whatsoever authority the said sales may be made, and the property so purchased shall be vested in him or her; but he or she shall be liable to the parties interested for the actual value of the property at the time of the sale, in cases where it shall have been sold at an under-price. If any executor or executrix shall purchase any property at the sales of the estate of his or her testator, he or she shall give bond, with surety, to the judge of probate of the county, conditioned to account for the purchase-money of the said property.”

These sections were originally parts of the same act (1839), and of course must be construed together. They declare the terms on which an executor is allowed to purchase at his own sale. It will be observed that the first section includes administrators as well as executors, and simply declares the liability of both for purchases at their own sales,—“shall be

liable to the parties interested for the actual value of the property at the time of sale in cases where it shall have been sold at an under-price," etc. The second section includes only executors, and was really unnecessary, except for the purpose of requiring them to give bond to the judge of probate "to account for the purchase-money of the said property"; that is to say, to make good the liability declared in the first section. Only executors were required to give bond to the judge of probate, as administrators had already done so under the general law.

The law is watchful of the rights of those who are not *sui juris*, or incapable of taking care of themselves; and we cannot think that the "bond with surety" required to be given by the executor to the probate judge was intended to be no more than a mere note, to secure his purchases for twelve months, and at the end of that time to be *functus*, or return to the executor, so that he could, without the consent of the probate judge or of the parties in interest, pay and cancel it like the sale note of a stranger, by simply charging himself with the amount in confederate money in order to invest it in confederate bonds. This surely would be requiring the bond for very little purpose. See *Reynolds v. Timmons*, 7 S. C. 497, where it is said: "An ordinary was required to take two classes of bonds,—one purely money bonds, etc., and the other class bonds of administrators or persons acting in a trust capacity. He was authorized to receive money in payment of the first class and to discharge the obligors. The second class were bonds of a peculiar character, the condition of which required the faithful performance of certain acts, and those he was not empowered to settle and discharge."

We rather suppose that, as to the purchases of the executor at his own sale, the bond was intended to be a continuing security under the control of the probate judge, somewhat like an administration bond. Both the nature of the liability declared and the use of the word "account" show that such was the intention of the legislature. It is true, there is no evidence that this executor gave the bond required by law. It does appear, however, that he received and enjoyed the property which he bid off, and we cannot doubt that the question of his liability should be considered under the terms and principles declared by law, just as if he had executed the bond: *Lipscomb v. Seegers*, 19 S. C. 430.

But it is urged that the debt for the executor's purchases, at

the end of the credit given, twelve months, was paid to himself by operation of law,—by force of the doctrine that a debt due by an executor to the estate he represents must be considered “as assets” in his hands; and as, at that time, there was no other currency in the country, these “assets” were in confederate money. There is certainly such a principle, but, as it strikes us, it is not applicable to this case. In the first place, the debt was not due to the testator at the time of his death, but arose afterwards out of the sale of property which the executor held in trust, and, according to the bond which the law required, was not payable to himself, but to the judge of probate. The executor was not both creditor and debtor. It may be that the executor could not deny that he was chargeable with the debt “as assets,” if, upon settlement, the beneficiaries demanded it; but they were not bound to do so,—they had the option to do it or not, as they saw fit: *Berry v. Hart*, 1 S. C. 125; *Clowney v. Cathcart*, 2 Id. 395.

Besides, the principle does not apply where the alleged “assets” were not a legal tender, or in any proper sense “assets” at all. To give it effect in this case would be a total misapplication: *Crawford v. Crawford*, 17 S. C. 525. In that case it was held, the chief justice delivering the judgment, that “while the rule of law is that a creditor is paid his debt when he becomes executor of his testator’s estate, and as such receives assets applicable to such debt, yet this rule does not apply when the assets so received are confederate money, unless the creditor was willing to receive it in payment.” If confederate money is not within the rule as to the payment of a debt due to the executor, we do not see why it should be as to the payment of a debt due by him. We think the judge of probate was right in charging the executor with the value of the property purchased by him at his own sale,—reduced according to the scale of confederate money as established by law.

This makes it unnecessary to consider the question of costs from the probate to the circuit court.

The judgment of the court is, that the judgment of the circuit court be reversed, and that of the probate court affirmed.

SIMPSON, C. J., dissented, on the ground that the executor having bought as other purchasers, at confederate prices, and to be paid in confederate money, there was no reason why he should not be allowed the same privilege as other purchasers, to wit, the right to make payment to himself when the debt be-

came due; and that his liability for the investment of the amount paid in by him be determined by the same principles applicable to his other investments.

EXECUTORS AND ADMINISTRATORS. — The effect of an executor or administrator purchasing at his own sale: See note to *Van Dyke v. Johns*, 12 Am. Dec. 85, 86.

PURCHASE BY AN EXECUTOR or administrator at his own sale is voidable: *Houston v. Bryan*, 78 Ga. 181; 6 Am. St. Rep. 252, and note 256.

EXECUTORS AND ADMINISTRATORS. — Where decedent's estate consisted of slaves, and other personal assets largely in excess of his debts, the administrator was not privileged to sell the slaves, under the provisions of the Virginia code, and could not therefore be responsible for the loss of the slaves by emancipation: *Green v. Thompson*, 84 Va. 376.

HARVIN v. GALLUCHAT.

[28 SOUTH CAROLINA, 211.]

ASSIGNMENT — NOTICE — LIABILITY OF DRAWEE. — An order on a fund operates as an assignment of so much of the fund due the drawer; but where the drawee pays the whole fund to the drawer, without actual personal notice of the assignment, such drawee is not liable to the assignee. In such case, notice to the husband of the drawee is not notice to her.

B. P. Barron, for the appellant.

J. F. Rhame and J. D. Blanding, contra.

SIMPSON, C. J. The plaintiff, appellant, brought the action below against the respondents, alleging the following facts in his complaint, to wit: That the respondent Rosa C. Galluchat, owning an unimproved lot in the town of Manning, and desiring to erect a brick storehouse thereon, borrowed from respondent McFaddin \$1,025, the payment of which she secured by a mortgage of the premises, covenanting therein that said sum would be expended in the construction of the proposed building; that the said Rosa C. employed one Joshua T. Carr to put up this building for the said \$1,025, the said Carr to furnish all necessary material; that Carr, with the knowledge of the said Rosa C. Galluchat, purchased from the appellant brick and lumber and other material to the amount of \$346.48, which went into the house, and for which Carr gave to appellant an order on Mrs. Galluchat for \$325, requesting the said Mrs. Galluchat to pay the same to appellant "out of the next payment, when due, on the brick building which he was then building"; that notice of said order was immediately given to the said Mrs. Rosa C. Galluchat and to

respondent McFaddin, and demand made for the sum assigned, and also notice that said sum was for material, brick, lumber, etc., furnished by the appellant to Carr in the erection of the storehouse mentioned. Upon which allegations, he demanded judgment for the sum of \$325, with interest from October 21, 1886, date of the order against the said Rosa C., and that the brick house and lot be sold, the proceeds to be applied to the payment of the said order, the appellant claiming a first lien, in preference to any other lien or mortgage on the premises.

The respondents answered separately, Mrs. Galluchat denying the main allegations in the complaint, especially as to knowledge on her part that the appellant had furnished the materials claimed, and as to notice to her of the order mentioned, or that plaintiff intended to claim a lien on the building, averring that, at the date of the order, she owed nothing to Carr, and that, at the commencement of the action, she owed nothing, having, previous to that time, paid the said Carr in full. Also stating that she had understood that such an order had, at one time, been presented to her husband, "but had been withdrawn to add something to it, or to amend it." McFaddin answered, admitting that shortly after the date of the order in favor of plaintiff, notice thereof was given to Col. J. D. Blanding, his attorney, and in whose hands, by agreement with Rosa C. Galluchat, the \$1,025 lent her had been placed, to be paid out on her contract with Carr, the builder; and that, at the time of said notice, Colonel Blanding had the sum of \$325 on hand, but that he had been advised that Mrs. Rosa C. Galluchat refused to give an order on Colonel Blanding to the plaintiff; on the contrary, had given an order to Carr herself for said sum, which Colonel Blanding had paid, and he denied that the plaintiff had any superior lien to his mortgage.

The case was heard by his honor, Judge Witherspoon, upon testimony taken at the trial. During the hearing, appellant's counsel announced that appellant did not rely upon a mechanic's lien, as provided by statute. The case, therefore, was tried upon the other questions involved. His honor found that, at the time of the order from Carr to appellant, Mrs. Galluchat was indebted to Carr in the sum of \$325, the amount of the order under the building contract; and he held that said order was an equitable assignment to appellant of said sum. He further found that Mrs. Galluchat did not

have actual notice of the order to appellant before she ordered said sum to be paid to Carr himself, which he held was necessary to make her liable to the appellant in this action, and therefore he ordered and adjudged that the complaint be dismissed as to each of the defendants, with costs.

The appellant does not distinctly question in his exceptions the correctness of his honor's holding, that Mrs. Galluchat did not have actual notice, in the sense of positive personal notice, of the order from Carr to the appellant before directing payment to Carr himself, but he contends that notice was given to her husband, also to Colonel Blanding, attorney, who held the money, and that such notice was mailed to Mrs. Galluchat in time, which was received by her said husband; and that these notices, amounting, as he claims, to notice to Mrs. Galluchat, were sufficient to fix her liability. And he alleged error to his honor, because he held that, in order to hold Mrs. Galluchat liable to plaintiff, he should make it appear affirmatively that she had received actual notice of the order to plaintiff before she paid the debt to Carr, doubtless understanding the term "actual notice," as used by his honor, to mean personal notice, as contradistinguished from notice to the parties mentioned above.

The single question in the case, then, is, Was it error in his honor to rule, as matter of law, that personal notice to Mrs. Galluchat was necessary, and consequently that the notices to the other parties mentioned were insufficient, there being no evidence that said notices had ever reached Mrs. Galluchat? It is laid down in all the authorities upon the subject of assignment of unnegotiable paper (Story, Pomeroy, and in numerous cases), that, in order to protect his rights under an assignment, the first duty of the assignee is to give notice to the debtor. A failure to do this is at the peril of losing the debt, either by a subsequent assignment to another party, or new defenses arising between the assignor and the debtor, or a payment by the debtor to the assignor.

It is true, the term "actual" is not used in the authorities as qualifying the notice, but it is said that notice must be given to the debtor, and when the purpose and object of the notice is considered, we are forced to the conclusion that actual personal notice is what is meant. The object of the notice is not only to protect the assignee, but the debtor also. The debtor has contracted to pay a certain party, and at common law he could not, by assignment of his contract, be made

the debtor of another with whom he did not contract, and to whom, perhaps, he would not have voluntarily assumed the relation of debtor. Equity, however, has practically repealed the common law on this subject, in enlarging the rights of the creditor, by recognizing his assignment; but at the same time the debtor is protected by the principle that the assignee shall stand in the shoes of the original creditor, assignor, and that the assignment shall be subject to all the equities existing between the original parties, not only at the time of the assignment, but up to the time of notice to the debtor, which notice the assignee must give to the debtor.

Such being the object of the notice, it seems to us that anything less than actual notice would fail to accomplish it, and that it would be a short measure of justice to hold that constructive notice would be sufficient. This is not a case like recording a deed or other paper required to be recorded, which is notice to the world, whether known or not, for the reason that knowledge is within the reach of all by proper diligence and inquiry; but it is a case where knowledge can only come by being imparted, and which the debtor can, by no diligence required of him, ascertain,—knowledge, too, which it is the especial duty of the assignee to impart. His claim is but an equity at best, and when he comes into court to enforce it, he must come recognizing the equity of the other side, to have been informed by an actual and not a mere constructive notice of the existence of his claim, and of the time when it was acquired, because no other notice except actual notice can protect the debtor; constructive notice being wholly insufficient, inasmuch as in its last analysis it is really the absence of actual notice.

Concurring, then, as we do, with the circuit judge upon this question, and also upon his finding that Mrs. Galluchat did not receive actual notice of the order to the plaintiff before the money was paid to Carr, it is unnecessary to consider the respective rights of defendant, McFaddin, and plaintiff.

It is the judgment of this court that the judgment of the circuit court be affirmed.

ASSIGNMENTS OF CHOSSES IN ACTION. — The assignment of a part of a debt or chose in action is not valid at law, but can be enforced in courts of equity: *Phillips v. Edsall*, 127 Ill. 536. So an order drawn, for a valuable consideration, upon a particular fund due the drawer is an equitable assignment of such fund to the assignee or payee of such order: *Les v. Robinson*, 15 R. I. 369; *Clark v. Gillespie*, 70 Tex. 513; *Harris County v. Campbell*, 68 Id. 22; 2 Am. St. Rep. 467, and extended note 472-475; *Chamberlin v. Gilman*, 10 Col. 94; *Brown v.*

Dunn, 50 N. J. L. 111. When a creditor assigns the whole or a part of a debt to another, notice must generally be given of the transaction to the debtor: *Brown v. Dunn*, 50 Id. 111; *Vanbuskirk v. Hartford F. Ins. Co.*, 14 Conn. 141; 36 Am. Dec. 473, and extended note 475-477. But when an order is drawn for a particular fund, the assignment is valid against a creditor subsequently garnishing the debtor, although the garnishee was not notified of such assignment until after garnishment, if he has sufficient time to disclose the fact of assignment by an affidavit to that effect before judgment is rendered: *Lee v. Robinson*, 15 R. I. 369; compare *Chamberlin v. Gilman*, 10 Col. 94. So in Tennessee, where by statute a bridge contract is assignable, no notice is necessary to make such an assignment binding upon the debtor: *Smith v. Hubbard*, 85 Tenn. 306. When the legal title to anything in action is vested in an assignee, the debtor is completely protected by the assignment as to any rights asserted by the assignor: *Grant v. Heverin*, 77 Cal. 263.

McFADDEN v. HEFLEY.

[28 SOUTH CAROLINA, 317.]

WILLS — CONSTRUCTION — DEVISE WHETHER SPECIFIC. — Where a pecuniary legacy is given with directions that it be laid out in land, without specifying what land, it will be regarded as a devise of real estate for some, but not for all, purposes; and the assent of the executor is necessary to perfect the title of the legatee. Until such assent, the legacy constitutes part of the personal assets of the testator, and as such must be applied, as the other personal estate, to the payment of his debts.

WILLS — CONSTRUCTION — SPECIFIC LEGACY. — A bequest of "all horses, mules, cows, hogs, wagons, farming implements, household and kitchen furniture, on said plantation," is a specific legacy.

WILLS — CONSTRUCTION — SPECIFIC LEGACY. — A bequest of personal property on a particular estate, capable of being singled out and specifically delivered, is a specific legacy.

WILLS — CONSTRUCTION — SPECIFIC LEGACY. — A bequest of the dividends arising on certain stocks, without a direct and express disposition of such stocks, carries the stocks with it, and is specific.

WILLS — CONSTRUCTION — SPECIFIC LEGACY. — A clause in a will directing the executor to dispose of all property not specifically disposed of, collect all money due, and use the interest thereon for certain purposes, and then pay the principal to the testator's children, does not create a specific legacy for them.

WILLS — CONSTRUCTION — SPECIFIC DEVISE. — A devise of the plantation on which the testator resided is specific, and cannot be abated until, first, the general legacies, and then the specific legacies, are exhausted.

WILLS — CONSTRUCTION — ABATEMENT OF LEGACIES. — For the payment of a testator's debts, specific legacies must abate before specific devises.

W. B. Wilson, Jr., and George W. Gage, for the appellants.

G. J. Patterson, and Glenn and McLure, for the respondents.

McIVER, J. The questions raised by this appeal are as to the proper construction of the will of J. M. Hefley, deceased,

a copy of which is set out in the case, and should be incorporated in the report of this case.

In item 1 of the will testator devised to his wife, the defendant, Rebecca Hefley, the plantation on which he resided, with limitations over to her children. In item 2, he gives to his said wife, with like limitations over to her children, "all the horses, mules, cows, hogs, wagons, farming implements, household and kitchen furniture, on said plantation." In item 3, he gives to certain of his grandchildren one hundred dollars each. Item 4 is in these words: "To my daughter Margaret Nunnery I give and bequeath four hundred dollars, to be invested by my executors in a homestead, the title to which is to be made to the said Margaret Nunnery and the heirs of her body." In item 5 a similar provision is made for his daughter Mary Simpson, in substantially the same language as that made for Margaret Nunnery in the fourth item.

In item 6 the testator directs his executors not to dispose of his stock in the National Bank of Chester and the Fishing Creek Manufacturing Company, but to hold the same and pay over the dividends arising therefrom to his wife, Rebecca, during her life or widowhood, and at her death or marriage divide said dividends among his children by his said wife, Rebecca. In the next item, which is also numbered 6, the executors are directed to dispose of all other property not specifically disposed of, collect all money due, and deposit the same in bank, "and that the interest accruing thereon be used for paying expenses of schooling the children; and further, that the said money so deposited be equally divided among the children of my wife, Rebecca, to be paid to them severally as they reach the age of twenty-one years."

The testator having made no provision for the payment of his debts, doubtless supposed that he would leave none. It turns out, however, that such is not the case, and the controversy is as to what provision shall be made for the payment of the debts and legacies. The circuit judge held that items 1, 4, and 5 are devises of real estate, and as such are specific, and must therefore be provided for, after payment of the debts, before any provision can be made for any of the legacies, either general or specific. He also held that "the widow is entitled to receive the dividends on the stocks bequeathed in item 6 of said will, less so much thereof as may be required to pay interest accrued since death of testator. The remainder of the debts and expenses must be paid out of the *corpus* of the per-

sonal property bequeathed in items 2 and 6 of said will; and leave is hereby granted to plaintiff to sell so much of the same as may suffice to pay said debts and expenses and the costs of this case. Nothing is left to satisfy the legacies of item 3 and of the second item 6."

From this judgment, Rebecca Hefley and her children appeal upon the several grounds set out in the record, which raise, substantially, the following questions: 1. Whether items 4 and 5, which stand precisely on the same footing, are specific devises of real estate, and as such entitled to priority over specific legacies; 2. Whether item 2 is a specific legacy; 3. Whether item 6 is a specific legacy; 4. Whether the second item numbered 6 is a specific legacy.

There can be no doubt that the rule originally was that all devises of real estate are specific, and this, as stated by Mr. Jarman, in his valuable work on wills, at page *587, and again at page *595, of his first volume, was because, prior to the statute of 1 Victoria (1838), very much like our act of 1858 (12 Stats. 700), after-acquired real estate did not pass under a will. Now, as these statutes have taken away the reason of the rule, a doubt has been suggested by Judge Wardlaw in *Laurens v. Read*, 14 Rich. Eq. 256, whether that rule still obtains, though from the authorities cited by Judge Hudson in his circuit decree in *Moore v. Davidson*, 22 S. C. 95, it would seem that in England the rule is still of force, and in this state, so far as we are informed, there has been no authoritative decision upon the subject. But as we do not regard items 4 and 5 of the will under consideration as devises of real estate, at least so far as the question raised here is concerned, we need not consider the effect of the act of 1858 upon the rule above referred to.

The ground upon which it is contended that these items are devises of real estate is, that courts of equity regard that as done which ought to be done; and therefore where land is directed by a will to be sold and converted into money, these courts will regard the land, even before an actual sale, as personalty; and upon the same principle where money is directed to be invested in land the provision will be regarded as a devise rather than as a bequest. But while this is a general principle upon which courts of equity act, it is not universally true. That is to say, that where money is directed to be laid out in land, it will not, for all purposes, be regarded as land. In *Hinton v. Pinke*, 1 P. Wms. 539, a money legacy was given

to be laid out in land, and upon a deficiency of assets, it was held that this legacy should be regarded as land, only for the amount which should remain after it had contributed its proportion towards making up the deficiency in the assets. The lord chancellor said: "I agree this fifteen-hundred-pound legacy shall be taken as land; but what the legacy is, or how much is to be laid out in land, is the question"; and it was held that the legacy must abate.

There is a very good reason for this. The whole personal property of the testator, which is the primary fund for the payment of debts, devolves upon the executor, and he is responsible to the creditors for the satisfaction of their demands, to the extent of the entire personal estate, "without regard to the testator's having by the will directed that a portion of it shall be applied to other purposes": 2 Williams on Executors, *982. From this follows the rule that the assent of the executor, which is presumptive evidence of a sufficiency of assets, to every legacy, whether general or specific, is necessary in order to perfect the legatee's title. Until such assent, the legal title to all of the personalty is in the executor, which he holds in trust, first, to discharge the debts, and then to pay the legacies in their proper order. Now, upon the principle that where money is directed to be laid out in land, the thing given is converted into the character of that in which it is directed to be invested, it is easy to see that a testator might, by directing his entire personal property to be invested in land, strip the executor of all means of paying the debts, and thus force the creditors to pursue the land.

It seems to us, therefore, that where, as in the present case, a pecuniary legacy is given, and the same is directed to be laid out in land, while, for some purposes, such a testamentary provision may be regarded as a devise of real estate, yet it cannot be so regarded for all purposes, and that the assent of the executor is necessary to perfect the title of the legatee; and that until such assent, the legacy constitutes a part of the personal assets of the testator, and as such must be applied, as the other personal estate, to the payment of debts.

It will be observed, too, that in these items, 4 and 5, the thing given is a specified sum of money, and the executors are charged with a trust to invest such money in land. The testator does not direct his executors to purchase a certain piece of land, and give that land to the legatee, but he gives a specified sum of money, to be invested in land. Until the execu-

tors had made provision for the payment of all of the debts, they would have no authority to divert any of the fund in their hands for that purpose,—the personal estate,—even though the testator may have “directed that a portion of it shall be applied to other purposes.” It seems to us, therefore, that the circuit judge erred in holding that items 4 and 5 should, in this case, be regarded as devises of real estate.

2. In 2 Fonblanque's Equity, 376, 377, it is said, upon the authority of *Sayer v. Sayer*, 2 Vern. 688: “Where one devises to his wife all of personal estate at W., this is a specific legacy, and is as if he had enumerated all the particulars there.” So in 2 Williams on Executors, *849, after a statement that a “bequest of all a man's personal estate generally is not specific,” it is said: “But if a man, having personal property at A. and elsewhere, bequeath all his personal property at A. to a particular person, the legacy is specific; . . . and so is a bequest of all the testator's goods and chattels in a particular county.” In *Pell v. Ball*, Speers' Eq., at page 48, it is said (*Italics ours*): “Whether a legacy is specific or not must necessarily depend upon the nature of the thing referred to and described in the will. If the thing be capable of individuality, as a ring or picture, or if it be an assemblage of things, as a library or cabinet, or something capable of being separated by sensible distinctions, *as the property on a particular estate*,—in all such cases the descriptions in the will set forth with distinctness the subject of bequest and make it specific. . . . It may be safely affirmed, I think, that whether a bequest couched in general terms is specific, or otherwise, depends on this: If the things falling within the terms, when enumerated (or if they had been enumerated by the testator), are in their nature specific, then the legacy is specific; otherwise it is not.” This language of Johnston, chancellor, is referred to with approval by Dunkin, chancellor, in his circuit decree in *Godard v. Wagner*, 2 Strob. Eq. 9, which, upon this point, was adopted by the court of appeals: See also *Brown v. James*, 3 Id. 24. Indeed, in *Warley v. Warley*, Bail. Eq. 397, Harper, chancellor, goes so far as to say that “a bequest of the testator's whole personal estate, or of the residue after specific legacies out of it, is to be regarded as specific”; though the subsequent case of *Henry v. Graham*, 9 Rich. Eq. 100, seems to be inconsistent with that view.

Under these authorities, we hold that the bequest in the second item of the will must be regarded as specific. The

things falling within the terms of this bequest are in their nature specific, and susceptible of being enumerated and specifically designated. It is a bequest of personal property on a particular estate, and, as such, capable of being singled out and specifically delivered.

Our next inquiry is as to the character of the bequest in item 6. It will be observed that the stocks therein referred to are not directly and expressly disposed of, or given to any one, but only the dividends thereon. There can be no doubt, under the authorities above cited, that if these stocks, and not merely the dividends arising therefrom, had been directly and expressly given to the beneficiaries therein designated, the bequest would have been specific. But "where the interest or produce of a fund is bequeathed to a legatee, or in trust for him, without any limitation as to continuance, the principal will be regarded as bequeathed also. Thus an indefinite gift of the dividends gives the absolute property of the stocks": 2 Williams on Executors, *864; *Philipps v. Chamberlaine*, 4 Ves. 51; *Page v. Leapingwell*, 18 Id. 463; *Adamson v. Armitage*, 19 Id. 418; *Earl v. Grim*, 1 Johns. Ch. 494. Here the bequest of the dividends was without limitation as to continuance, and there being nothing in the will to show that the testator intended to make any other disposition of the stocks themselves, under the rule stated they passed with the dividends, and as we have said, the bequest must be regarded as specific.

The next question is whether the bequest mentioned in the second item numbered 6 can be regarded as specific. We see nothing in the terms of this item, or in the character of the property there disposed of, which would invest it with the character of a specific bequest. It is couched in the most general terms, and the property referred to is not specifically designated.

Item 1 is clearly a specific devise of real estate, and cannot, therefore, be abated until, first, the general legacies, and then the specific legacies, are exhausted: *Warley v. Warley*, *supra*. It was argued, on behalf of appellants, that there is no priority as between specific devises and specific legacies, but that when abatement becomes necessary, they must abate *pro rata*. While, under the view which we take, this may not become a question of any interest to the appellants, yet, to avoid misconception, we desire to say that we do not concur in that proposition. The rule is otherwise. See *Hull v. Hull*, 3 Rich. Eq. 65, recognized in *Farmer v. Spell*, 11 Id. 549.

The judgment of this court is, that the judgment of the circuit court be modified in accordance with the views herein announced, and that the case be remanded to that court for such further proceedings as may be necessary.

WILLS. — EQUITABLE CONVERSION ON REALTY INTO PERSONALTY, and personality into realty, by the provisions made in a will: See extended note to *Ford v. Ford*, 5 Am. St. Rep. 141-148. Where decedent devised his realty to his wife for ten years, for the support of his children, and directed that "then all my lands to be sold by my executor and the money divided equally among my children as they come of age," and the executor having died without fully executing the will, and four years after the wife had died, the land was sold by an administrator *de bonis non cum testamento annexo*, the proceeds of such sale as between the devisees must be regarded as personalty: *Orrender v. Call*, 101 N. C. 399. So where a testator provided in his will that his "out-lands not herein named shall be sold, etc., for the payment of debts and legacies," such out-lands must be held to be converted by the terms of the will into personalty: *Perkins v. Coughlan*, 148 Mass. 30; compare *Ford v. Ford*, 72 Wis. 621. But in a case where by will realty is commanded to be converted into personalty by the executors, such realty cannot be treated as personalty and sold by one executor without the consent of the others: *Crowley v. Hicks*, 72 Wis. 539.

SPECIFIC LEGACIES are such only as designate particular things, or things by a particular description: *Cooch's Ex'r v. Cooch's Adm'r*, 5 Houst. 540; 1 Am. St. Rep. 161; note to *Walton v. Walton*, 11 Am. Dec. 468-471. Where a testator, having disposed of his whole estate in previous clauses in his will, added another clause, "Independent of all provisions heretofore made, . . . I give eight hundred dollars out of the money due my estate, to be applied to the education of my youngest daughter, Fanny," said eight hundred dollars is a special legacy, to be paid out any fund in hand, or other assets of whatever nature belonging to the decedent's estate: *Lee v. Smith*, 84 Va. 289. But a bequest of "ten thousand dollars in such cash, stocks, notes, or bonds" as the testator may have at the time of his death is not a specific legacy: *Martin v. Osborne*, 85 Tenn. 420; compare *Roquet v. Eldridge*, 118 Ind. 147.

SPECIFIC BEQUESTS are chargeable with the payment of the testator's debts, unless his realty is expressly charged therewith: *Cooch's Ex'r v. Cooch's Adm'r*, 5 Houst. 540; 1 Am. St. Rep. 161, and note.

CHAPMAN v. CITY COUNCIL OF CHARLESTON.

[28 SOUTH CAROLINA, 378.]

PRACTICE. — SUPREME COURT WILL NOT REVERSE a judgment upon grounds not taken in the court below, nor in the exceptions, unless for want of jurisdiction, but such court will affirm a judgment upon other grounds than those upon which it was based in the lower court.

PLEADING AND PRACTICE. — WANT OF SUFFICIENT DISTINCTNESS in the complaint, in referring to the plaintiffs, should be taken advantage of by motion to make the allegations in the complaint more specific and definite, and not by demurrer.

PLEADING AND PRACTICE. — COMPLAINT IN ACTION calling for an account for the value of stock illegally transferred is not open to demurrer, as failing to state facts sufficient to constitute a cause of action in omitting to give a specific description of the stock, and demand for its retransfer.

MUNICIPAL CORPORATIONS — LIABILITY FOR PRIVATE TORT. — Whether a municipal corporation can be held liable for a tort committed by its authority, by reason of some malfeasance or misfeasance in the performance of a private duty, *quære*.

MUNICIPAL CORPORATIONS CANNOT BE HELD LIABLE for the value of certain certificates of stock transferred in a manner different from that agreed upon in such certificates. The remedy, if any exists, is by action *ex contractu*.

MUNICIPAL CORPORATION IS LIABLE FOR AN ILLEGAL TRANSFER of shares of stock by its officers or agents acting within the scope of their authority.

G. D. Bryan, for the appellant.

Lord and Hyde, for the respondent.

McIVER, J. The only question raised by this appeal is, whether the circuit judge erred in overruling the oral demurrer to the complaint, based on the ground that the complaint does not state facts sufficient to constitute a cause of action. The complaint is quite long, and need not be inserted in full in this opinion, though a copy of it should be incorporated in the report of the case, for a full understanding of all the details. It will be sufficient to state here that the object of the action is to make the city council of Charleston liable for allowing an illegal transfer of certain certificates of city stock, in which the plaintiffs claim they are entitled to an interest.

The only papers incorporated in the record submitted to us are the complaint, the decree of the circuit judge, and the exception of appellants. From these we learn that the only ground upon which the demurrer was urged before the circuit judge was that the action was for a tort, and that, in the absence of any statute imposing such liability, a municipal corporation is not liable to such an action. The circuit judge held, however, that "the complaint alleges a state of facts which shows a liability on the part of the said defendant, growing out of a contract and an illegal transfer to others of the evidences of the debt due on the contract; such transfer having been made by the officers of the defendant corporation." He therefore held that the action was "for the specific delivery of certain city stock so illegally transferred, or for an account for the same, and is not one of those actions in which a municipal corporation is not liable."

He accordingly rendered judgment overruling the demurrer, and from this judgment the city council of Charleston appeal, upon the following grounds: 1. That his honor erred in not dismissing the complaint herein, on the ground that this defendant, being a municipal corporation, is not liable in an action like this, in the absence of an act of the general assembly giving such right of action; 2. That his honor erred in not holding that, if any liability existed, it was on the part of the officers of the city making the transfer, and that the doctrine of *respondeat superior* does not apply.

The counsel for appellants, in his argument here, has endeavored to sustain his demurrer upon grounds other than those presented to or decided by the circuit judge, and other than those presented in his exceptions. Under the well-settled rules and practice of this court we are not at liberty to consider such grounds. The questions presented by these additional grounds do not appear to have been considered or determined by the circuit court, and therefore they present nothing for us to review. It is true that this court has in many cases affirmed the judgment of the circuit court upon other grounds than those upon which it was based in that court; but this court has never undertaken to reverse a judgment upon a ground not taken in the circuit court or in the exceptions, unless it be for want of jurisdiction, which, as has been frequently held, may be taken at any time. The cases of *State v. Penny*, 19 S. C. 218, and *Segler v. Coward*, 24 Id. 122, were both cases of jurisdiction.

We may, say, however, that even if these grounds had been properly taken, we do not think they would have been sufficient to sustain the demurrer. The first, presenting an objection to the want of sufficient distinctness in the complaint, in referring to the appellants, is more properly a ground for a motion to make the allegations of the complaint more specific and definite rather than a ground for demurrer. The second and third, based on the want of a specific description of the certificates of stock and the failure to allege demand, even if conceded to be valid objections to an action for the specific delivery of the certificates of stock (as to which we say nothing), were certainly not sufficient to sustain a demurrer to an action calling on appellants to account for the value of the stock illegally transferred.

The real question then is, whether the action must be regarded as an action of tort to which a municipal corporation

is not liable. It will be observed that the cases of *Coleman v. Chester*, 14 S. C. 286, *Black v. Columbia*, 19 Id. 412, 45 Am. Rep. 785, and *Young v. Charleston*, 20 S. C. 116, 47 Am. Rep. 827, cited by appellants to show that a municipal corporation cannot be made liable for a tort (to which may be added the case of *Gibbes v. Beaufort*, 20 S. C. 213), were all cases in which it was sought to make a municipal corporation liable for tort by reason of some malfeasance or misfeasance in the performance of a public duty, imposed upon it as a governmental agency of the state. But whether a municipal corporation can be made liable for a tort committed by its authority, by reason of some malfeasance or misfeasance in the performance of some duty not of a public, but of a private, nature,—a duty which it does not owe to the public generally, but one which it has assumed to a private individual,—is a question which has not been argued, and which we are not now prepared to decide.

We will therefore proceed to consider the question whether this action must be regarded as an action of tort. We agree with the circuit judge that it is not to be so regarded. It is stated in the complaint that each of the certificates of stock contained a provision "that the debt evidenced thereby was recorded in and transferable only at the office of the city treasurer by appearance in person or by attorney, according to the rules and form instituted for that purpose." This provision necessarily implies an agreement on the part of the corporation that no other mode of transfer of the stock will be recognized by the corporation; and if there has been, as alleged, a breach of such contract, an action for the damages sustained thereby would be an action arising out of contract, and not an action of tort.

Again, in the case of *Magwood v. Railroad Bank*, 5 S. C. 379, an action like this was sustained, not upon the ground of tort, but upon the ground that a corporation "is bound to protect the title of a *cestui que trust*, under a trust of its stock declared upon its books, against the exercise of powers forbidden by or inconsistent with the nature and terms of such trust." It is true that the corporation sued in that case was not a municipal corporation, but, so far as the question we are considering is concerned, that can make no difference. If, as alleged in the complaint, the stock was illegally transferred by the executors of the will under which plaintiffs claim, such transfer was a breach of trust by the executors; and if, as is also alleged

in the complaint, the transfer could only have been made with the co-operation of appellants, acting through their officers appointed for the purpose, then the appellants would be participants in such breach of trust, and as such liable in equity to account to the *cestui que trust*. It seems to us, therefore, that the action need not necessarily be regarded as an action of tort, and that the circuit judge committed no error in overruling the demurrer.

As to the second ground of appeal, it would be sufficient to say that the question there presented does not seem to have been raised in the circuit court; but we may add that, even if properly raised, it could not be sustained. A corporation can act only through its officers or agents, and the corporation is liable for the acts of such officers or agents within the scope of their authority.

The judgment of this court is, that the judgment of the circuit court be affirmed.

APPELLATE PROCEEDINGS. — The appellate court will not reverse for error not assigned and excepted to in the court below: *Arneson v. Thorstad*, 72 Iowa, 145; *State v. Maher*, 74 Id. 82; *Clarkson v. Hibler*, 39 Kan. 125; *Gafford v. Hall*, 39 Id. 166; *Huhn v. Missouri P. R'y Co.*, 92 Mo. 440; *Garretson v. Equitable etc. Ass'n*, 74 Iowa, 419; *Paddleford v. Cook*, 74 Id. 433; *Magarity v. Shipman*, 82 Va. 784; *Lander v. Hall*, 69 Wis. 326; *Thompson v. People*, 125 Ill. 256; *Byington v. Commissioners of Saline Co.*, 37 Kan. 654; *Whieler v. Lawrence*, 112 Ind. 229; *Perry v. Hardison*, 99 N. C. 21; *Burns v. People*, 126 Ill. 282; *Sharp v. Hoffman*, 79 Cal. 405; *Rodman v. Harvey*, 102 N. C. 1; *Teele v. Armstrong*, 71 Tex. 59; *Weathersbee v. Staton*, 98 N. C. 255, with other North Carolina cases therein cited and approved; *Hayes v. Minnich*, 116 Ind. 233; *People v. Jensen*, 66 Mich. 711; *Bewley v. Graves*, 17 Or. 274; *Slater v. Chapman*, 67 Mich. 523; 11 Am. St. Rep. 593; *Tuskaloosa etc. Co. v. Perry*, 85 Ala. 158; *People v. Barker*, 60 Mich. 277; 1 Am. St. Rep. 501; *Turner v. Johnson*, 95 Mo. 431; 6 Am. St. Rep. 62; *Viele v. Germania Ins. Co.*, 26 Iowa, 9; 96 Am. Dec. 83, and note; *Hendrickson v. St. Louis etc. R. R. Co.*, 34 Mo. 188; 84 Am. Dec. 76, and note; *Gates v. Andrews*, 37 N. Y. 657; 97 Am. Dec. 764; but want of jurisdiction can be raised for the first time in the appellate court: *Tuskaloosa etc. Co. v. Perry*, 85 Ala. 158; or that the complaint does not state facts sufficient to constitute a cause of action: *Randleman Mfg. Co. v. Simmons*, 97 N. C. 89; *Moore v. Glover*, 115 Ind. 367; *Branch v. Faust*, 115 Id. 464; *Hornaday v. Shields*, 119 Id. 201; *Hall v. Wadsworth*, 30 W. Va. 55. Nor will the appellate court reverse for errors to which exceptions were made too late in the lower court: *Phifer v. Alexander*, 97 N. C. 335; and under the Iowa practice, errors properly assigned, but not argued, will not be considered by the appellate court: *Riordan v. Guggerty*, 74 Iowa, 688. But when a case is triable *de novo* in the appellate court, objections to the competency of evidence made in the lower court may be renewed, although exceptions were not taken to the improper admission of such evidence below: *Cochrane v. Breckenridge*, 75 Iowa, 213. The practice is to affirm a judgment, where neither the record nor the case on appeal

shows any exception or assignment of error: *Carroll v. Barden*, 97 N. C. 191, and cases therein cited and approved; *Wilson v. Shepherd*, 98 Id. 154; *Feibotte v. Mullen*, 36 Minn. 144; *Freeman v. Rhodes*, 36 Id. 297; *Dupree v. Tutin*, 97 N. C. 94, and cases therein cited and approved; *Anthony v. Eates*, 99 Id. 596. Where there are no specifications, the party cannot be heard upon a motion for a new trial: *Hershey v. Kness*, 75 Cal. 115. So where no oral argument is had, and appellant fails to file any points or authorities, the judgment will be affirmed without even an examination of the record: *Paris v. Lampeon*, 73 Id. 190; and so a judgment will be affirmed when the transcript contains nothing but the judgment appealed from and the proceedings in the lower court subsequent to the rendition thereof: *Watson v. Watson*, 69 Tex. 105.

APPELLATE PRACTICE. — Errors complained of on appeal must always be affirmatively shown: Note to *Slater v. Chapman*, 11 Am. St. Rep. 595, 596.

PLEADING — DEMURRER. — Objection of want of particularity in a statement of a cause of action is not properly to be taken advantage of by demurrer: *George v. Thomas*, 16 Tex. 74; 67 Am. Dec. 612; for the proper remedy in such a case is a motion to make more specific: *Snowden v. Wilas*, 19 Ind. 10; 81 Am. Dec. 370; and so duplicity and redundancy are not grounds for demurrer, except in the case of dilatory pleas: *Cannon v. Lindsey*, 85 Ala. 198; 7 Am. St. Rep. 38.

TORTS, LIABILITY OF CORPORATIONS FOR: See extended note to *Orr v. Bank of United States*, 13 Am. Dec. 596-598; *Hussey v. Norfolk etc. R. R. Co.*, 98 N. C. 34; 2 Am. St. Rep. 312, and note 317.

MUNICIPAL CORPORATIONS ARE NOT LIABLE for the torts of its police-officers: *McElroy v. City Council of Albany*, 65 Ga. 387; 38 Am. Rep. 791; *Calwell v. City of Boone*, 51 Iowa, 687; 33 Am. Rep. 154; *Grumbine v. Mayor*, 2 McAr. 578; 29 Am. Rep. 626; *Pollock's Adm'r v. Louisville*, 13 Bush, 221; 26 Am. Rep. 260. And although a city may be liable for the torts of its agents done in an act authorized by it (*Durkee v. City of Kenosha*, 50 Wis. 123; 48 Am. Rep. 480), yet it is not liable for torts committed by its officers and agents in unlawful and prohibited acts: *Hunt v. City of Boonville*, 65 Mo. 620; 27 Am. Rep. 299; *Wallace v. City of Menasha*, 48 Wis. 79; 33 Am. Rep. 804; *Roseland v. City of Gallatin*, 75 Mo. 134; 42 Am. Rep. 395.

HARMON v. COLUMBIA AND GREENVILLE R. R. Co.

[28 SOUTH CAROLINA, 401.]

RAILROADS — LIABILITY FOR NEGLIGENCE OF LESSEE. — Though a railroad corporation is authorized to lease its road, it does not by so doing exempt itself from liability for the value of cattle negligently killed by the lessee in operating the road.

RAILROADS — LIABILITY FOR ACT OF LESSEE. — A railroad company cannot escape the obligations which it assumed in accepting its charter by leasing its road to another, whether the injury complained of arises from a defective track or from carelessness in running trains.

Andrew Crawford, for the appellant.

J. C. Haskell, for the respondent.

McIVER, J. This was an action brought by the plaintiff to recover damages for the alleged killing of certain of his cattle by the negligence of the defendant company in running its trains. There was some testimony of a very indefinite character tending to show that the defendant company had leased its road to the Richmond and Danville Railroad Company, which latter company was operating the road at the time of the alleged killing of the plaintiff's cattle. The circuit judge granted a motion for nonsuit, upon the ground that after the lease of the road the defendant could not be held liable, and from this judgment of nonsuit the plaintiff appeals upon the several grounds set out in the record, which need not be repeated here, as the sole question for us to determine is, whether the defendant is relieved from liability by its voluntary lease of its road to another company. While the testimony as to the fact of the lease is not very full or clear, yet the counsel for respondent has very properly waived any objection on that ground, for the purpose of presenting squarely the legal question involved.

It is not to be denied that there is some conflict of authority in the different states as to this question; but we think that the weight of authority, as well as of reason, is in favor of the view contended for by the appellant. When a railroad company accepts a charter, it assumes the performance of all the duties to the public which are imposed upon it by the charter or the general laws of the state, and it cannot be permitted to escape from the obligations thus imposed upon it by transferring its chartered rights and privileges either to an individual or to another corporation. A corporation must, of necessity, always act through individuals, and whether such individuals are called its officers or agents, or its lessees, cannot affect the question of its liability to perform the obligations which it has incurred in consideration of the grant of its chartered rights and privileges. It cannot be permitted to enjoy the benefits conferred by its charter without incurring the responsibilities incident thereto.

As was said in one of the cases, if it were otherwise, a railroad company, by leasing its road to irresponsible persons, might enjoy all the benefits conferred by its charter, and practically leave the public generally, as well as individuals, without any of the protection which the obligations imposed upon the company by its charter, as well as the general law of the state, were designed to afford. Accordingly, we find it laid

down by Mr. Justice Davis in the case of *Washington etc. R. R. Co. v. Brown*, 17 Wall. 450, as "the accepted doctrine in this country that a railroad corporation cannot escape the performance of any duty or obligation imposed by its charter or the general laws of the state by a voluntary surrender of its road into the hands of lessees." This doctrine was recognized and affirmed by this court in *National Bank v. Railway Co.*, 25 S. C. 222, although the court in that case, not because any doubt was entertained as to the soundness of the doctrine just laid down, did state, merely as an additional reason for the conclusion there reached, that the contract there was made with the lessor, and not with the lessee. The cases cited by the counsel for appellant in his argument here show that the courts of many of our sister states have adopted the same view.

The circuit judge seems to rest his conclusion upon the ground that, inasmuch as under the charter of the defendant company it has power to lease its road, it follows necessarily that when the road is leased the company is released from all its obligations to the public and to individuals, and these obligations then rest solely upon the lessee. We cannot accept this view. It rests upon the idea that, inasmuch as the defendant company incurs these obligations in exchange, as it were, for the chartered rights and privileges conferred by the legislature, when such rights and privileges are transferred to another by the consent of the legislature, the corresponding obligations are likewise transferred to such other person or corporation. This, at first view, seems plausible, and is the view adopted in some of the states. But it rests upon the unfounded assumption that the defendant company has transferred all of its chartered rights and privileges to the Richmond and Danville Railroad Company. We understand the testimony as tending to show, and the concession of counsel to be, simply that the defendant company has leased its road to the Richmond and Danville Railroad Company, and not that it has transferred all of its chartered rights and privileges to that company. On the contrary, this very case necessarily implies that the defendant still maintains its corporate organization and existence, and instead of running its road itself directly, has bargained with another company to run it for a compensation, as we must suppose. The defendant company, therefore, in reality still enjoys the benefits of its charter, and cannot be permitted to escape its corresponding obligations.

What would be the effect of an absolute transfer of all its chartered rights and privileges by a sale made under proper authority is not the question before us. The fact, therefore, that the defendant company is authorized by its charter (act of 1845, 11 Stats. 828) "to farm out" or lease its road to another company, and that it has done so, does not exempt it from responsibility in the absence of any provision granting such exemption; and there is no such exemption in defendant's charter.

The counsel for respondent, in his argument here, has attempted to draw a distinction between the liability of a lessor for an injury sustained by reason of some omission of duty resting upon the lessor, — as, for example, from the defective condition of the track or of a bridge existing at the time of the lease, — and an injury arising from some negligence of the lessee's servants in running the trains. We see no ground for such a distinction, which really rests upon a denial of the principles above laid down. If, as we have seen, the defendant company cannot escape the obligations which it assumes in accepting its charter by leasing its road to another, then, whether the injury complained of arises from a defective track, or from carelessness in running the trains, can make no difference. In both instances the obligations assumed by the defendant company have been violated, and it must bear the responsibility. The fact that the defendant company has found it more convenient or more profitable to exercise its corporate rights through its lessee, rather than by its own officers and agents, cannot relieve it from the performance of its corresponding obligations.

Whether the plaintiff may not have been entitled to elect to proceed against the lessee as the person or corporation actually doing the act complained of, or whether the defendant company may not be entitled to have recourse upon its lessee in case it should be held liable to the plaintiff in this action, are questions which do not arise upon this record, and have not therefore been considered.

The judgment of this court is, that the judgment of the circuit court be reversed, and that the case be remanded to that court for a new trial.

RAILROADS. — LIABILITY OF ONE RAILROAD COMPANY for the acts of another company to whom it has leased its line of railroad: *Nugent v. Boston etc. R. R. Co.*, 80 Me. 62; 6 Am. St. Rep. 151, and note 163; *International etc. R. R. Co. v. Dunham*, 68 Tex. 231; 2 Am. St. Rep. 464, and note 467; AM. ST. REP., VOL. XLII. — 44

but the liability of the lessor of a railroad does not prevent the lessee from being liable also for the negligence of its servants and agents: *Pennsylvania Co. v. Sloan*, 125 Ill. 72; 8 Am. St. Rep. 337. The lease of a railroad does not relieve the lessor from liability with respect to its duties to the public: *International etc. Ry Co. v. Kuehn*, 70 Tex. 583; compare *Central etc. Ry Co. v. Morris*, 68 Id. 49; *International etc. R. R. Co. v. Eckford*, 71 Id. 274.

WANDO PHOSPHATE COMPANY v. GIBBON.

[28 SOUTH CAROLINA, 412.]

CONTRACT TO MINE — BREACH OF — REFUSAL TO DELIVER POSSESSION AFTER NOTICE. — A party in possession of the mine of another under a contract under seal to take a certain quantity of rock each year "until the mines are exhausted," cannot retain possession after notice to quit, claiming under his contract, refusing to deliver possession, and continuing to take out rock. Such contract is for personal services only, and his only remedy is an action for damages for breach of the contract.

Barker, Gilliland, and Fitzsimons, for the appellant.

James Simons, and Mitchell and Smith, for the respondent.

SIMPSON, C. J. The appellant being the owner of a certain tract of land situate in Charleston County, containing a deposit of phosphate rock, employed the defendants, respondents, to mine said lands under the following written agreement, to wit:—

"1. That the said George E. Gibbon, Jr., and E. J. Hanahan agree and contract to mine all the available phosphate rock on the lands of the Wando Phosphate Company, near Bee's Ferry, in Charleston County, in the state aforesaid, and deliver the same properly washed and weighed to the said company on board of lighters and vessels at the wharf of the company, situate on said land, at four dollars and seventy-five cents (\$4.75) per ton for each and every ton of 2,240 pounds so mined, washed, weighed, and delivered, provided, that if no vessel is ready to receive the rock, the same shall be dumped on the wharf, or on the adjacent land, at the option of the company.

"2. The said Wando Phosphate Company agree to furnish to the parties of the first part a washer, engine, boilers, a railroad of necessary length, and having a track three feet wide, with proper switches and frogs, twenty cars of usual size, mules, and whatever else may be necessary to constitute a plant suitable and proper for carrying on said mining operations, and shall pay to the said parties of the first part four

dollars and seventy-five cents per ton for each and every ton of phosphate rock so mined, washed, and delivered, as provided for in the first clause of this agreement, said payment to be made weekly or monthly.

"3. The said parties of the first part agree to furnish the necessary labor and to pay for the same, and also to feed the mules, and defray all the other expenses necessary to the mining, washing, and delivering of said rock, as hereinbefore provided for, keeping everything in order at their expense, damages other than usual wear and tear to machinery, engine, and boilers excepted.

"4. The said parties of the first part agree to mine not less than two thousand tons of phosphate rock within one year from the time the plant hereinbefore provided for has been turned over to them, and to mine not less than four thousand tons for each and every succeeding year until the mines are exhausted.

"5. It is mutually agreed that in case the said parties to these presents shall differ as to what is 'available phosphate rock,' as provided for in the first article, or what is necessary to constitute a plant suitable and proper for carrying on said mining operations, as provided for in the second article hereof, such difference shall be submitted to arbitrators, one to be appointed by the party of the first part, and one by the party of the second part, with the right to said arbitrators, in case they should not agree, to call in an umpire, and the award of said arbitration shall be final and conclusive on said parties.

"6. The said parties of the first part are to have the use of the houses now standing on the said lands of the party of the second part.

"In witness whereof, the said parties have hereunto set their hands and seals on the day and in the year first above written.

[Signed]

"G. E. GIBBON, JR. [L. s.]

"E. J. HANAHAN. [L. s.]

"F. B. HACKER, [L. s.]

"Pres. Wando Phos. Company."

This agreement was entered into on November 22, 1881, and after the work had been carried on for several years thereunder, the appellant, finding that they were suffering great loss on account of the decline in phosphate rock, on February 2, 1887, gave notice to the respondents that the work should be discontinued on and after February 5th, when the property in possession of said respondents, including the lands, washer,

railroad track, mules, and implements belonging to the appellant, should be delivered up. This notice was disregarded by the respondents, who continued to hold possession of the property mentioned after said notice, and also after frequent other notices of the same kind continued to dig the soil and remove the rock. Whereupon the action below was commenced by the appellant, demanding judgment for damages in the sum of thirty thousand dollars for the alleged trespasses; and further, that respondents be enjoined from the further continuance of said trespasses and injuries. The respondents, admitting most of the allegations in the complaint as to the character of the work, etc., denied that they were trespassers, and contending that they had performed, and were performing, their part of the contract above set out, interposed said contract as a defense to the action. The appellant demurred to respondents' answer, on the ground that it did not state facts sufficient to constitute a defense. This demurrer was overruled by his honor T. B. Fraser, and the complaint ordered to be dismissed, with costs.

The plaintiff has appealed upon thirteen exceptions. The main point raised, however, is, that his honor erred in holding that the respondents had the right to continue their work and employment until the "mines were exhausted"; that such was the meaning and intent of the contract between the parties, and that appellant had no right to discontinue said work so as to make the respondents trespassers. Error is alleged also to his honor in dismissing the complaint without motion, or notice of motion, to that effect, and on demurrer to the answer. The other exceptions allege error more to the reasoning of his honor leading up to the holding suggested above, rather than to any principle of law directly involved.

We come now to the question, Did his honor interpret correctly the contract between the parties? Was it a definite contract for the continuance of the work provided for therein until the mines should be exhausted? and if so, did it authorize the respondents to hold on to the property after notice to quit, thereby constituting a good defense to the charge of trespass? There is no doubt that a party in the possession of the lands of another, acknowledged to be his, and of property like that mentioned here, using it, digging the soil, and removing the rock, etc., would be a trespasser, unless he is in possession as lessee, under a contract of rent, under an irrevocable license, or by permission and consent. It will be conceded,

we suppose, that a party using the property of another, as it is admitted the defendants were using the property of the plaintiff here, to avoid being held responsible as a trespasser, would be required to show that he stood in relation to the owner in one or more of the conditions mentioned above.

Now, was the contract under which the respondents held, and upon which they rely, either a lease, a contract of rent, a license coupled with an interest, or a permission to hold and use, as claimed? It was certainly neither of the first three, and therefore they may be dismissed without further remark. The question then recurs, Was it a permission, taking effect at the time of its execution, and at the beginning of the employment of the defendants, and to continue of force until the "mines were exhausted"? Were the terms used, to wit, "to furnish not less than four thousand tons for each and every succeeding year until the mines were exhausted," as found in the fourth paragraph of the contract, intended to indicate the duration of the employment, and so understood by the parties? or were they used merely to indicate the quantity of rock to be taken yearly from the mines while the mining continued, provided there was available rock present?

We have felt great hesitation in reaching a conclusion on the first question, because, on the one side, if it was the purpose of these parties to fix definitely and positively a duration to their business obligations upon both sides, this certainly could have been done much more distinctly than by the phrase used. And besides, this phrase is found in a somewhat singular place in the contract, if such was its purpose. It is found in the fourth paragraph, which stipulates for the quantity of rock to be mined annually by the respondents, and seems to have been thrown in more for the benefit of said respondents than anything else, giving room for a decreased quantity, less than the four thousand tons stipulated for, in case the mine should begin to run out, rather than to extend the contract to an indefinite period, to be measured and marked only by the exhaustion of the mine. And yet, on the other side, when the words employed are interpreted according to their ordinary and usual signification, there is ground for the position that the contract was to last as long as the mines furnished available rock to the extent of four thousand tons per annum. But be this as it may, there is certainly no express, formal provision in the contract obligating the plaintiff to continue the business of mining until the mines were

exhausted, nor for any definite or fixed period. Nor do we think there is any necessary implication of such a result. It is true that the defendants stipulated and agreed to mine not less than four thousand tons of rock for each and every succeeding year until the mines were exhausted. And in another section of the contract, the plaintiff stipulated to pay \$4.75 for each ton mined and furnished, etc.; but it nowhere appears clearly that the plaintiff contracted to keep the business running, even at a ruinous sacrifice, until the mines were exhausted.

There are two English decisions, found in 5 Adolphus and Ellis, N. S., which are very similar to this, and which, we think, should control here. In the first case (*Aspdin v. Austin*, 5 Ad. & E. *671), plaintiff agreed to manufacture for defendant cement of a certain quality, with the materials, machinery, and implements to be furnished by the defendant, the defendant engaging to pay four pounds weekly during the two years following the date of the agreement, and five pounds weekly during the next year following, and also to receive plaintiff into partnership at the expiration of the three years. Each party bound himself in a penal sum to fulfill the agreement. It was held that the stipulations in the agreement did not raise an implied covenant that defendant should employ plaintiff in the business during three or two years, though defendant was bound by express words to pay plaintiff the stipulated wages during those periods respectively, if plaintiff performed, or was ready to perform, the condition precedent.

In this case the plaintiff was discharged before the expiration of the period mentioned, and he brought action for damages on account of the discharge. In delivering the opinion of the court, Lord Denman, C. J., said: "The breach here assigned by the plaintiff assumes that the defendant, at however great loss to plaintiff, was bound to continue his business for three years, but the defendant has not covenanted to do so. He has covenanted only to pay weekly sums for three years to the plaintiff, on condition of his performing what, on his part, he has made a condition precedent, and the plaintiff will be entitled to recover those sums, whether he performs that or not, so long as he is ready and willing and offers to perform it, and is prevented only by the defendant from doing it."

The other case (*Dunn v. Sayles*, 5 Ad. & E. *687) was to the same effect, upon a similar contract. The court in these cases

seem to have held that while the contract to pay the stipulated sums for the services to be rendered might be binding, if the plaintiff was ready and willing to perform them, and was prevented improperly by the defendant, yet that defendant could not be required to continue the business against his will, and to his great injury. In other words, that he had the right to dismiss his employee, and to discontinue his business at the peril of being held responsible for failure to comply with his contract to pay so much weekly, etc.

Now, in the case before the court. As we have already said, there is no distinct and positive contract on the part of the plaintiff, that the business of mining shall go on until its mines were exhausted, which the plaintiff has breached by dismissing the defendants, and by virtue of which contract the defendants can hold on to the property in question after notice to quit. The contract which plaintiff has breached, if any, is like that in the two cases above cited, to wit, a contract to pay the defendants the sums stipulated for the rock to be mined. But the breach of this contract, if any, does not entitle the defendants to continue in possession of the property. Mr. Wood says: "When a servant is discharged, whether rightfully or not (*Ross v. Pender*, 10 Sess. Cas. S., 3d series, 301), he must leave peaceably, and surrender to the master all property belonging to him, including a house, if he occupies it as a servant, and if he fails to do so, the master may forcibly eject him from the premises: *Seangall v. Crawford*, 2 Mur. 40; *Bertie v. Beaumont*, 16 East, 34; and the fact that the servant leaves quietly, without protesting against his discharge, cannot be construed as evidence of an acquiescence therein: *Champion v. Hartshorne*, 9 Conn. 564; *McAllister v. Ogle*, 1 Ir. Jur., Com. P., N. S., 313; for it is his duty to leave peaceably, and he does no more than his duty by quietly departing": Wood on Master and Servant, 2d ed., sec. 146.

In each of the cases in Adolphus and Ellis, above, the employee brought the action relying upon an alleged breach of the contract between the parties, that the employer had discontinued the work and discharged the plaintiff without cause before the expiration of said contract. The court held that there was no covenant, either express or implied, that the work should continue, and therefore the action could not be sustained, saying that the breach assigned should have been the failure to pay the stipulated wages during the specified time, for which there was a contract. So here, the defendants inter-

posed the agreement, setting up the defense that they had the right thereunder to continue the work until the mines were exhausted. The circuit judge sustained this defense by overruling the demurrer. We think this was error, for the reason, like the cases cited *supra*, there was no contract for the continuation of the work for a definite or an indefinite period. Whether there was a contract that defendants should be employed to the extent of furnishing 4,000 tons of rock per annum until the mines should be exhausted, at \$4.75 per ton, is not one of the issues in the pleadings, and is not therefore directly involved.

But assuming that it is, and that such a contract was made, and that being under seal, based upon mutual promises and stipulations, and in every way founded upon a sufficient legal consideration, it is a valid contract, binding and obligatory upon both parties, and further that it has been breached,—what is the remedy, and what is the relief to which the defendants are entitled? The remedy for a breach of contract depends entirely upon the nature and character of the contract breached. If it be a contract by which the party of the second part has acquired the possession of property, real or personal, as a purchaser, lessee, or otherwise of a defined interest, as a term of years, etc., or a license coupled with an interest irrevocable, we suppose that he could retain possession. Or if it be a contract which the courts would specifically enforce according to its terms, he might obtain such enforcement. Or if it be a contract the breach of which sounds in damages only, his remedy would be an action for damages, and his relief a recovery of such damages as the facts required.

In the first class he could retain possession, because his possession is founded upon title. In the second, if in possession, he could still retain it, because the courts would enforce a specific performance, if he was out of possession, by putting him in possession. But in the last class his rights rest in contract which has given him no defined interest in possession, but simply an agreement to have a certain thing done or not done, the violation of which entitles him, not to have the agreement fulfilled specifically, but to damages in case of a failure to comply. Take the case of an overseer, an agent, or clerk, employed for a certain number of years, and dismissed without sufficient cause before the expiration of the contract; could he still perform the stipulated duties in defiance of the dismissal of the employer, perforce? Would this be his legal remedy?

or would not an action for damages be the legal and proper course?

We think the respondents occupied the relation of ordinary laborers to the appellant, — employees to do a certain work, — their possession being his possession, and that possibly they were employed to do this work “until the mines were exhausted,” and that the appellant has broken this employment at the peril of being subjected to pay such damages as the respondents may have sustained; but we do not think that the respondents bought any right or title to the property in question, nor was the contract such a contract as the court of equity would specifically enforce, and in that way authorize them to hold to their possession. But it is a contract sounding in damages, for the breach of which their only remedy is an action for damages, and that since the service of notice to quit upon said defendants their possession has been without authority, and therefore the action below is maintainable, it being substantially an action for exclusive possession on the part of the appellant: See the principle laid down by Wood on Master and Servant, quoted above, extracted from the cases which he cites *supra*.

The main ground of our conclusion is, that even admitting the contract to have been a contract until the mines were exhausted (which question we do not adjudicate decisively), yet it was a contract involving personal services only, and gave no title to the property, either real or personal, or any right to possession or use as against the true owners, and therefore that defendants could not continue to hold in defiance of the demand of the appellant, the admitted owner. See Wood on Master and Servant, 2d ed., sec. 155: “When a servant occupies a dwelling-house as accessory to the performance of his duties, he is not a tenant, and if he is discharged, his right to possession ceases, and he must surrender, or he may be forcibly ejected. And when the servant is discharged, the right of the master to enter does not depend upon the question whether he has been rightfully or wrongfully discharged, but exists in the one case as well as in the other, the master incurring the peril of paying damages, if the discharge is wrongful. But the right to expel the servant from the house exists, whether he had good cause or not,” their remedy, if they have any, being as we have said, an action for damages for breach of contract. If they were out of possession, they certainly could not be put into possession by a specific enforcement of the

agreement, for the reason that the contract was neither a contract for the purchase of land, nor of anything else having a special value over and above an ordinary pecuniary one, giving rise to equity jurisdiction in such cases. And being in possession, they cannot hold possession, for the same reason.

Our judgment is, that the demurrer should have been sustained in so far as it negatived the answer as a bar to the action, and that the case should have proceeded on the claim of appellant for damages, if any, and his right to the restraining order prayed for.

The conclusion above renders a discussion of the other questions raised unnecessary.

It is the judgment of this court that the judgment of the circuit court be reversed, and that the case be remanded.

MINING CONTRACT. — Where A granted to B the right to enter upon his land, and mine and remove minerals "during the continuance of the agreement," etc., paying A a royalty of so much per ton of mineral taken out and removed, and it was agreed that B could cease mining at any time, the estate that B took under such an agreement was an estate at will, determinable at the will of either party: *Knight v. Indiana etc. Co.*, 47 Ind. 105; 17 Am. Rep. 692. A license to dig ore from another's land is revocable at any time at the pleasure of him who gives it: *Riddle v. Brown*, 20 Ala. 412; 56 Am. Dec. 202. An indenture between a landlord and certain miners granting them the right to dig for gold upon his land so long as they may deem it advisable to search for gold, creates no easement upon the land, but merely an unassignable lease thereof: *Hodgson v. Perkins*. 84 Va. 706; *Barkdale v. Hairston*, 81 Id. 764.

BOYKIN v. ANCRUM.

[28 SOUTH CAROLINA, 496.]

RULE IN SHELLEY'S CASE WHEN INAPPLICABLE. — If the word "issue" is so qualified by additional words as to evince an intention that it is not to be taken as descriptive of an indefinite line of descent, but is used to indicate a new stock of inheritance, the rule in Shelley's Case does not apply.

WILLS — CONSTRUCTION OF DEVISE FOR LIFE. — Under a devise to A for life, and after his decease to his lawful issue absolutely and in fee, but if A should die without lawful issue at the time of his death, then to B, A takes a life estate, with limitation over to his issue in fee as purchasers.

MERGER IS THE ANNIHILATION of one estate in another, and takes place usually when a greater estate and a less coincide and meet in one and the same person, without any intermediate estate, whereby the less is immediately merged; that is, sunk or drowned in the greater.

MERGER OF EQUAL ESTATES. — The general rule is, that equal estates will not merge in each other; but to this rule there are well-established ex-

ceptions. Even when the estates are theoretically equal, the first in the order of succession may merge in the next vested remainder. An estate at will may merge in an estate for years, and estates for years may merge into each other or in estates for life. Estates for life may merge into each other.

MERGER. — AN ESTATE FOR YEARS WILL MERGE IN A REVERSIONARY TERM OF YEARS, even though the latter is of less duration.

WILLS — MERGER OF LIFE ESTATES — STATUTE OF LIMITATIONS AS AGAINST REMAINDERMEN. — Where, under a devise to A for life, remainder to B for life, and remainder to B's issue in fee, B purchases A's estate, and dies, leaving the latter surviving, his estate is merged in that of B, and at the death of the latter, his issue are entitled to the estate in fee, but if B conveys the land, and dies, the statute of limitations will begin to run from that time in favor of his grantee and against his heirs, whose rights, after twenty years' acquiescence in the adverse possession of such grantee, are barred.

IMPROVEMENTS — INTEREST. — Party in possession who is allowed the value of his improvements should not be allowed interest thereon from the time of filing the decree.

W. M. Shannon, for the appellants.

J. T. Hay, for the respondents.

McGOWAN, J. In the year 1831 William Ancrum died, leaving a will, by the fifth clause of which he devised as follows: "And as to my real estate, I give and bequeath and devise unto my dearly beloved wife, Julia, my dwelling-house, situate in the town of Camden, with the appurtenant lands and hereditaments thereunto belonging, . . . for and during the term of her natural life. From and after the decease of my said dearly beloved wife, I give and bequeath and devise my said dwelling-house . . . to my eldest son, Fowler Brisbane Ancrum, for and during the term of his natural life; and from and after his decease to his lawful issue absolutely and in fee-simple. If my eldest son, Fowler Brisbane Ancrum, should die leaving no lawful issue at the time of his decease, then and in such case I give, bequeath, and devise my dwelling . . . to my second son, William Alexander Ancrum, for and during the term of his natural life; and from and after his decease to his lawful issue absolutely and in fee-simple. But if my said second son, William Alexander Ancrum, should die leaving no lawful issue at the time of his decease, then and in such case I give, bequeath, and devise my said dwelling, etc., to my third son, Thomas James Ancrum, for and during the term of his natural life, and from and after his decease to his lawful issue forever and in fee-simple," etc.

The eldest son, Fowler Brisbane Ancrum, died early, with-

out lawful issue at the time of his death. The second son, William Alexander Ancrum, purchased the life estate of his mother, Julia (afterwards Mrs. Glass), in 1837 (the deed, however, was not proved); and thus being, as he doubtless supposed, the owner of the fee, on March 25, 1857, he conveyed the premises described, with the usual warranty, to one Joseph W. Doby, who in 1863 conveyed them to James R. Read; and he (1873) to Martha C. Jennings, and she (1876) to E. D. Durham, and he (1876) to Thomas James Ancrum, and he (1881) conveyed the same to William A. Ancrum, trustee, with the exception of one half acre, which was conveyed (1884) to Fannie C. Johnson, and William A. Ancrum, trustee (1885), conveyed one acre of said premises to H. U. Parker. Fannie C. Johnson, being advised that she had good legal title, made improvements on the premises conveyed to her, which enhanced their value \$1,450; and William A. Ancrum, trustee, supposing that his title was good, made improvements on the premises conveyed to him, which enhanced their value \$2,000.

William Alexander Ancrum died in the month of July, 1862, leaving at the time of his death as his lawful issue his son, Thomas J. Ancrum, and four daughters, viz.: Mary, who intermarried with C. J. Shannon, Elizabeth B., who intermarried with Samuel Boykin, Ellen, who intermarried with Francis D. Lee, and Margaret, who intermarried with Samuel F. Boykin. Elizabeth was born April 25, 1848, and Margaret was born on May 6, 1848, and died April 28, 1884, leaving as her heirs at law her husband, Samuel F. Boykin, and four minor children, viz., Douglass A., Samuel F., Mattie R., and William A. Boykin.

In 1872, while James R. Read held the premises, Thomas J. Ancrum, Mary A. Shannon, and Ellen D. Lee, three of the children of William Alexander Ancrum, by their deed under seal, released and relinquished all right or claim in said premises sold by their father. Julia Glass, the widow of the testator, died in 1885, and Elizabeth B. Boykin and the husband and children of her deceased sister, Margaret Boykin (being the two children of William A. Ancrum, who did not release their interest in the premises), instituted this action, some time in the latter part of the year 1855 (the exact date does not appear), against the several parties in possession, to recover their respective shares of the aforesaid premises, as purchasers under the will of William Ancrum, and to partition the same

among themselves. The defendants claim that the first son, Fowler Brisbane Ancrum, being out of the question, the devise gave a vested fee conditional to William A. Ancrum, and having aliened the premises after issue born, his alienees are seised in fee. And failing in this construction, that they had acquired title by the statute of limitations and presumption of a grant from lapse of time, etc.

The issues of fact and of law were referred to the master, J. D. Dunlap, Esq., who made a very full and clear statement of the facts, as herein summarized, and held that William A. Ancrum took under his father's will only a life estate in remainder after the life estate of his mother, Julia, and that his children and grandchildren (whose parent was dead) took by purchase as remaindermen, and not as heirs by limitation; and that Elizabeth B. Boykin and the heirs of her deceased sister, Margaret Boykin, are entitled to recover their shares of the premises in question: the said Elizabeth B. one-fifth part thereof, and the other plaintiffs (heirs of Margaret) another one-fifth part, and all proper rents, and allowing credits for improvements accordingly, etc.

This report was heard upon exceptions by his honor Judge Norton, who confirmed the report as to the construction of the will of William Ancrum. But he held that upon the purchase of his mother, Julia's, life estate by William Alexander Ancrum, that estate was merged in his own life estate, and as that ended with his death, in July, 1862, a right of action then accrued to the remaindermen, who were under no disability to sue; and that the lapse of twenty years from that time until the action was brought raised the presumption of a grant from Mrs. Elizabeth B. Boykin, and as to her, he dismissed the complaint; but he decreed that Samuel F. Boykin, the husband of Margaret, who had died, was entitled to one fifteenth, and each of her four minor children to one thirtieth, of the premises claimed.

From this decree both the plaintiffs and defendants appeal to this court, the defendants upon the single ground that "his honor erred in adjudging that under the will of William Ancrum the children of William A. Ancrum took as purchasers an estate in fee-simple in remainder in the premises described, and that William A. Ancrum took only a life estate therein."

The plaintiffs' exceptions:—

· "1. Because his honor erred in holding that when W. A. Ancrum purchased the life estate of Mrs. Julia Glass in the

premises described in the complaint, her life estate merged in the life estate of the said W. A. Ancrum.

"2. Because his honor erred in holding that the presumption of a grant was set in motion against the plaintiffs at the time of the death of W. A. Ancrum.

"3. Because his honor erred in holding that the occupancy of the premises since the death of W. A. Ancrum has created a complete presumption that Mrs. Elizabeth B. Boykin had conveyed her interest in the premises to the alienee of W. A. Ancrum.

"4. Because his honor erred in not holding that the presumption arising from an adverse holding ceased to operate from the time of J. R. Read's purchasing the interests of certain co-tenants of the plaintiffs on the — day of —, 1872, and from that time became permissive and amicable.

"5. Because his honor erred in holding that the defendants are entitled to interest on the amount allowed them for improvements from the day of filing of said decree, when the evidence shows that they are in possession of said premises and receiving the benefits of the same."

As to the construction of the devise, "to my second son, William Alexander Ancrum, for and during the term of his natural life, and from and after his decease to his lawful issue, absolutely and in fee-simple. But if my said second son, William Alexander Ancrum, should die, leaving no lawful issue at the time of his decease, then, and in such case," over, etc. Without going again into the authorities upon the subject, we think this case is concluded by that of *McIntyre v. McIntyre*, 16 S. C. 294, where the authorities are cited and the conclusion satisfactorily stated by Mr. Justice McIver, as follows: "We think the authorities in this state conclusively show that where the word 'issue' is so qualified by additional words as to evince an intention that it is not to be taken as descriptive of an indefinite line of descent, but is used to indicate a new stock of inheritance, the rule [in *Shelley's Case*] does not apply." In that case, as in this, the antecedent estate was expressly "for life," and after the decease of the tenant for life, to the "issue." The superadded words there were, "and their heirs forever," while here they are "absolutely, and in fee-simple,"—an equivalent phrase certainly quite as strong as the other. Besides, here there is still another limitation over to the third son, Thomas James Ancrum,—“but if my said second son, William A. Ancrum, should die, leaving

no lawful issue at the time of his decease," etc. We agree with the master and circuit judge that William Alexander Ancrum took only a life estate in the premises described, and that there was a limitation over to his issue as purchasers.

Then, as to the plaintiffs' exceptions. The first charges that it was error in the judge to hold "that when W. A. Ancrum purchased the life estate of Mrs. Julia Glass in the premises described her life estate merged in the life estate of W. A. Ancrum." It was certainly just, when Chancellor Kent adopted the language of a great master in the doctrine of merger, "that the learning under this head is involved in much intricacy and confusion." "Merger is described as the annihilation of one estate in another. It takes place usually when a greater estate and a less coincide and meet in one and the same person, without any intermediate estate, whereby the less is immediately merged; that is, sunk or drowned in the greater": *Garland v. Paplin*, 32 Gratt. 305; 2 Bla. Com. 177; 4 Kent's Com. 100. Taking this definition, do the conditions exist here for a merger? Mrs. Glass had an estate for life, and (passing over the eldest son, who had died early) the next vested estate was that of William Alexander Ancrum, which was also for life, without any estate intervening. These respective estates were to be enjoyed successively, and not concurrently,—that of the mother, Julia, coming first in the order of succession. But in 1837 W. A. Ancrum purchased the life estate of Julia, and held both, claiming the premises as his own absolutely until he sold and conveyed them to Doby in 1857. Did not this make the case referred to in the books "of the incompatibility of a person filling at the same time the characters of tenant and reversioner in one and the same estate"?

It is said, however, that both estates were for life, and therefore equal in degree, and merger only takes place when a larger and smaller estate meet in the same person. The general rule is, that equal estates will not drown in each other, but there are well-established exceptions. Were these estates equal in the sense of the rule? Looking at them from the point of view of W. A. Ancrum, one was an estate for the life of Mrs. Julia Glass, preceding his estate, and the other succeeding was for his own life. There seems to be something in the order in which the estates stand to each other in the matter of time. Chancellor Kent states the rule thus: "The merger is produced, either from the meeting of an estate of higher degree with an estate of inferior degree, or from the

meeting of the particular estate and the immediate reversion in the same person. An estate for years may merge in an estate in fee or for life; and an estate *pur autre vie* may merge in an estate for one's own life; and an estate for years may merge in another estate or term for years, in remainder or reversion. . . . To effect the operation of merger, the more remote estate must be the next vested estate in remainder or reversion, without any intervening estate, either vested or contingent; and the estate in reversion or remainder must be at least as large as the preceding estate."

It seems that even when the estates are theoretically equal, the first in the order of succession may merge in the next vested remainder, being in this respect somewhat like a surrender, which is the relinquishment of a particular estate in favor of the tenant of the next vested estate in remainder or reversion. In the notes to the case of *James v. Morey*, 2 Cow. 246, 14 Am. Dec. 475, *Leading Cases in the American Law of Real Property*, lately published (1887) by Sharswood and Budd, vol. 3, p. 231, the rule is thus stated: "The estate in reversion or remainder must be as large as or larger than the estate to be merged: 3 Preston on Conveyancing, 51. The expression 'as large or larger' must be of course taken in the technical sense; thus an estate for life is larger than an estate for years, although death may destroy the former estate long before the efflux of time has brought the latter to a conclusion. Thus if a lease be made for years, with a remainder to the lessee for life, the estate for years will merge; but if there be an estate for life, with remainder to the life tenant for years, there will be no merger: Co. Lit. 54 b. In *Sheehan v. Hamilton*, 4 Abb. App. 211, it is said that estates of equal degree do not merge; but whether this be strictly so or not, the effect of a merger will be produced by the unity of possession. An estate at will will merge in an estate for years: 3 Preston on Conveyancing, 176. Estates for years may merge in each other or in estates for life. Estates for life will merge: Co. Lit. 338 b; *Cary v. Warner*, 63 Me. 571; *Allen v. Anderson*, 44 Ind. 395." We cannot say that the circuit judge committed error in holding that when W. A. Ancrum purchased the life estate of Mrs. Glass in the premises that estate merged in his estate.

Exceptions 2, 3, and 4 make the point, substantially, that the judge erred in holding that at the death of William A. Ancrum (1862) the rights of the issue in remainder attached,

and from that time the possession of the parties was adverse, so as to put in motion the presumption of a grant from Mrs. Elizabeth B. Boynkin, who reached her majority in 1864, two years after the death of her father, W. A. Ancrum, and more than twenty years before the commencement of the action. The life estate of Mrs. Glass was the first in the order of succession, and doubtless was expected to be the first to fall in; the fact, however, was otherwise, for she survived W. A. Ancrum for more than twenty years. It is true that but for his purchase of her estate, W. A. Ancrum would never have reached the possession of his estate; and it is asked whether, under these circumstances, his right must be limited to his own life estate, which, though vested, he never enjoyed in possession, so as to make his death, and not hers, the time at which an action accrued to the remaindermen. At first view it is not obvious how an estate which turned out to be the longest could be drowned in one of shorter duration; but according to the authorities, it seems that such was the necessary consequence of the merger: See *Mangum v. Piester*, 16 S. C. 330; 4 Kent's Com. 99; 2 Pomeroy's Eq. Jur., sec. 787, and notes, where it is said that "an estate for years will merge in a reversionary term of years, even though the latter is of less duration," citing, among other authorities, *Welsh v. Phillips*, 54 Ala. 309; 25 Am. Rep. 679. And Chancellor Kent says: "The estate in which the merger takes place is not enlarged by the accession of the preceding estate, and the greater or only subsisting estate continues after the merger precisely of the same quantity and extent of ownership as it was before the accession of the estate which is merged, and the lesser estate is extinguished," etc.

We cannot doubt that the premises were held adversely to all the world. During his life, William A. Ancrum held them as his own absolutely. Shortly before his death (in 1857), he conveyed them to Joseph W. Doby, with the usual warranty of title. We do not see how the relinquishment of some of the remaindermen could affect the character of the possession as to those who did not relinquish. We do not, however, think that the defendants should have interest on the value of their improvements while they have the possession and use of the same.

The judgment of this court is, that the judgment of the circuit court, with the slight modification as to interest on the value of the improvements, be affirmed.

STATUTE OF LIMITATIONS. — The general rule is, that the statute of limitations does not begin to run against reversioners or remaindermen during the lifetime of the tenant of the supporting estate: *Orthwein v. Thomas*, 127 Ill. 554; 11 Am. St. Rep. 159, and cases cited in note 173.

MERGE OF ESTATES, WHEN TAKES PLACE: See note to *Speed's Est'r v. Hoss*, 15 Am. Dec. 81-83.

IMPROVEMENTS. — As to WHAT A DEFENDANT IN AN EJECTMENT SUIT may claim by way of improvements upon the land from which he is ejected by a successful claimant, see *Barrett v. Stradl*, 73 Wis. 385; 9 Am. St. Rep. 795, and note 805, 806.

WILLS, CONSTRUCTION OF. — A devise of a life estate to A, with remainder to his heirs in fee, vests in A an estate in fee, and this result cannot be avoided by other parts of the devise showing that the intent of the testator was to give A only a life estate: *Carpenter v. Van Olinder*, 127 Ill. 42; 11 Am. St. Rep. 92, and note 99, for instances of constructions put by the courts upon similar words in devises. A conveyance to F. to have and to hold unto said F. during his life, and at his death to his heirs, creates in F. a life estate, with remainder in fee to his heirs: *Brown v. Ferrell*, 83 Ky. 417.

STATE v. TURNER.

[29 SOUTH CAROLINA, 34.]

CRIMINAL LAW — MURDER — EVIDENCE OF BAD CHARACTER OF DECEASED.

— In cases of homicide, evidence of the general bad character of deceased is inadmissible, unless the plea of self-defense is interposed. In that event, evidence of his bad character for violence, treachery, vindictiveness, etc., is admissible, where it reasonably appears that the prisoner knew or may be supposed to have known such character or conduct.

CRIMINAL LAW — MURDER — EVIDENCE OF BAD CHARACTER OF DECEASED.

— Where the prisoner and deceased fought in the morning, the latter using an ax at the time, and afterwards following the prisoner to his storehouse, where the fatal affray took place, evidence of the reputation and general character of the deceased for violence is admissible, as bearing upon the act and motive of the prisoner.

CRIMINAL LAW — MURDER — INSTRUCTIONS — QUESTION FOR JURY.

— The degree of homicide in any special case depends upon the motive which prompted the killing, and this is a matter entirely for the jury. The judge should define and explain these different degrees, and the jury must be governed by the definitions and explanations given; but whether any particular crime, as defined by the judge, has been committed, or whether the case is one of self-defense, as explained by the judge, is a question of fact, and is alone for the jury.

CRIMINAL LAW — MURDER — INSTRUCTIONS — QUESTION FOR JURY.

— Charge in a murder case that the facts stated by the accused, if believed by the jury, might reduce the offense to manslaughter, thereby excluding from its consideration all question of self-defense in connection with such facts, is error.

PLEADING AND PRACTICE — INSTRUCTIONS. — Exception taken to a detached portion of a charge to the jury cannot be sustained when the charge, taken together and considered as a whole, is consistent and proper.

Bomar and Simpson, C. P. Sanders, and J. S. Cothran, for the appellant.

D. R. Duncan, for the appellee.

SIMPSON, C. J. The appellant was convicted of manslaughter at the October term of the court of general sessions, 1887, for Spartanburg County, and was sentenced to five years' imprisonment in the penitentiary. He appeals to this court, alleging error to the charge of the trial judge in several particulars, and to the exclusion of certain testimony, as appears in the exceptions found in the case.

After full consideration, our conclusion is, that the case must go back, and a new trial had. This is based mainly upon two of the exceptions, or rather upon two of the alleged errors, raised and presented in the exceptions of appellant, to wit: 1. The exclusion of certain witnesses offered to testify as to the general character of the deceased for violence; and 2. To that portion of his honor's charge in which he stated to the jury as follows: "I charge you that in this particular case, if you believe the defendant's statement, that the deceased had told him, 'God damn you, I will kill you,' and accompanied those words by moving towards the door with an apparent purpose of putting the threat into execution immediately, then a verdict of manslaughter might be proper in the case; or if the circumstances did not prove to your satisfaction that there was malice either express or implied."

The rule as to the character of the deceased in cases of homicide seems to be as follows: In general, no evidence will be admitted when confined to bad character, as contradistinguished from character for violence, ferocity, vindictiveness, etc., on the ground that such testimony would be irrelevant. Nor would testimony as to violence and brutality, when offered simply as an excuse or palliation for the homicide, be competent; for the reason that no one has the right to take the law into his own hands and to rid the community, *pro bono publico*, of a dangerous member, simply on the ground that he is dangerous. "But where the defendant sets up self-defense, and proceeds to present a case of apparent danger honestly believed in by himself as a defense, then evidence of the deceased's ferocity, for strength, brutality, and vindictiveness, is relevant to show the *bona fides* of the defendant's belief": Wharton on Homicide, 2d ed., secs. 605, 607. The great matter in every case of homicide is the motive which prompted

the fatal act, and to ascertain this, in justice to the accused, all of the surrounding circumstances and facts calculated to influence motive and to prompt action, and relevant to the important issues involved, should be admitted.

In our state the prominent case in which the question here was involved is the case of *State v. Smith*, 12 Rich. 430. The court said in that case: "It seems hardly necessary to observe that evidence of the character and habits of the party slain is proper only so far as they can be supposed to have affected the intention of the slayer in the fatal act. And therefore his general bad character is inadmissible. The evidence should be confined to a character and habits of violence, treachery, etc., such as might beget reasonable apprehensions of grievous bodily harm, and reduce the other party to the apparent necessity to slay in self-preservation. . . . But whether the general character or conduct, or particular acts of the description mentioned, be offered, it appears to be essential to their reception that it should somehow reasonably appear that the prisoner knew, or may be supposed to know, such character or conduct; for if he was ignorant of them, they could not possibly have modified his intention in the act of slaying. And, of course, if the relevancy does not appear from prior evidence in the case, the party offering it must lay the foundation for its reception in the proof of facts making it relevant, and the court must necessarily have the power to decide, subject to review, upon its relevancy." An analysis of the ruling in this case amounts to this: Such testimony is competent where it is relevant, either because of prior evidence received in the case, or where the prisoner has laid the proper foundation for its reception by proof of facts making it relevant, and where it reasonably appears that the prisoner knew, or may be supposed to have known, such character or conduct.

In the case before the court, the prisoner and the deceased had fought in the morning, the deceased using an ax in the rencontre. After this fight, and after the prisoner had gone to a neighbor's house, the deceased continued near the scene of the morning conflict, and when the prisoner returned, going immediately into his storehouse, the deceased followed him closely, and approached the door of his house. What took place immediately, or rather what was said by the deceased at the moment of approaching his door, it is true, was not stated until after the excluded testimony had been offered and excluded. But independent of what might have been said, it

seems to us there was enough in the facts as stated to render competent, at least, testimony as to the deceased's character for violence as bearing upon the act and motive of the prisoner. Here was a man with whom he had fought in the morning, a man who had exhibited a deadly purpose in attempting to kill him with an ax. He had followed him to his house, and without accosting him, was approaching his door. Whether he was a quiet and peaceable man, or a man of blood and violence, was a fact which, under the circumstances, if known to the prisoner, he could hardly fail to consider, and which would necessarily have some influence in determining his own course.

But the rule above laid down requires that it should reasonably appear that the prisoner knew, or may be supposed to have known, such character, offered to be proved. We think such knowledge was involved in the proposition to prove the general character of the deceased for violence. General character is that character which is generally known, and if the witnesses offered had been allowed to testify, and they had proved that the general character of the deceased for violence was bad, we think it would have reasonably appeared that the prisoner knew this as well as others.

Next, as to the charge of his honor mentioned above. The degree of a homicide in any special case depends upon the motive which prompted the killing, and this is a matter entirely for the jury. The judge should define and explain these different degrees, and the jury must be governed by the definition and explanations given. But whether any particular crime, as defined by the judge, has been committed, or whether the case is one of self-defense, as explained by the judge, is a question of fact, and is alone for the jury. Now, we do not intimate, even, that the jury in this case misinterpreted the facts, being misled by the charge, and that they found manslaughter when their verdict should have been self-defense. We express no opinion whatever on that subject. But we think his honor's charge above did not leave the question of self-defense open to the jury. He said the facts stated by the prisoner, if believed by the jury, might reduce the case to manslaughter, excluding thereby all consideration of self-defense in connection with said facts.

Now, self-defense, as defined by Mr. Greenleaf (vol. 3, sec. 116, 14th ed.), is "where one is assaulted upon a sudden affray, and in the defense of his person, where certain and im-

mediate suffering would be the consequence of waiting for the assistance of the law, and there was no other probable means of escape, he kills the assailant." This is the proper definition, which is a question of law, but whether the facts bring the case under this principle is for the jury. And it seems to us that it ought to have been left to the jury to determine, under the facts stated, if proved, whether there was great danger of bodily harm, and whether the prisoner had other probable means of escape besides killing the deceased; or in other words, whether he had well-grounded reasons to believe (such as would influence ordinary men) that his life or body was in danger, and that there was no probable hope of escape but in striking in his own defense, leaving it to the jury to apply the testimony to this principle of law.

We do not understand the judge to have laid down the proposition absolutely that the only way in which the jury could find the defendant not guilty was by concluding that there was no possible way of barricading against the deceased, as alleged in one of the exceptions. True, when the charge is taken in detached remarks, a portion might be susceptible of that construction; but when considered as a whole on the subject of self-defense generally, we do not think it is obnoxious to the error assigned in said exception.

The other exceptions are overruled.

It is the judgment of this court that the judgment of the circuit court be reversed, and that the case be remanded for a new trial.

CRIMINAL EVIDENCE — BAD CHARACTER OF DECEASED IN CASES OF HOMICIDE. — Evidence of the bad character of deceased is only admissible in homicide cases, where the defendant claims justification of his deed by way of self-defense: *People v. Garbutt*, 17 Mich. 9; 97 Am. Dec. 162, and note; *Harrison v. Commonwealth*, 79 Va. 374; 52 Am. Rep. 634; for the purpose of such evidence is to prove defendant's honest belief in his immediate and imminent peril at the hands of the deceased: *Lang v. State*, 34 Ala. 1; 5 Am. St. Rep. 324; *Tiffany v. Commonwealth*, 121 Pa. St. 166; 6 Am. St. Rep. 775. Evidence that the deceased went habitually armed with deadly weapons, and that such fact was known to the defendant, is admissible; but the bad character of deceased cannot be shown by particular acts of misconduct not connected with defendant, for it is his general reputation for turbulence and viciousness that must be shown: *King v. State*, 65 Miss. 576; 7 Am. St. Rep. 681; and in showing the character of the deceased as a turbulent and dangerous man, the court may explain that a turbulent and dangerous man refers to one who would take unfair advantage of another, or a man who was accustomed to fight in a dangerous way: *Cleveland v. State*, 86 Ala. 1. Compare *McDade v. State*, 27 Tex. App. 641; 11 Am. St. Rep. 216, and note.

CRIMINAL EVIDENCE — ADMISSIBILITY OF THREATS MADE BY DECEASED. — When the defendant has been threatened with death by the deceased, and such threats have been communicated to him, the killing is justifiable if deceased at the time of the homicide manifested any intention of carrying out his threats; therefore such threats are always admissible in favor of the accused: *Alexander v. State*, 25 Tex. App. 260; 8 Am. St. Rep. 438, and note; *Bonnard v. State*, 25 Tex. App. 173; 8 Am. St. Rep. 431; *Hart v. Commonwealth*, 85 Ky. 77; 7 Am. St. Rep. 576, and note 579; *State v. Ellis*, 101 N. C. 765; 9 Am. St. Rep. 49, and note. Threats made at the time of a difficulty by a third person, for whom deceased was mistaken by the defendant, are admissible in favor of defendant, when he had knowledge of such threats, but not admissible when he had no such knowledge: *Cleveland v. State*, 86 Ala. 1; *Miller v. State*, 27 Tex. App. 63. And when evidence of threats against defendant made by the deceased are properly introduced in the case, it is reversible error for the court to refuse to charge the jury as to the law applicable to such threats: *Potter v. State*, 85 Tenn. 88.

HOMICIDE — INSTRUCTIONS. — On trial for murder, instructions should distinctly set forth the law applicable to the case as made both by the prosecution and particularly by the defendant: *Meuly v. State*, 26 Tex. App. 274; 8 Am. St. Rep. 477; and this is especially true where the defendant has introduced evidence tending to establish his plea of self-defense: *Tillery v. State*, 24 Tex. App. 251; 5 Am. St. Rep. 882.

SELF-DEFENSE. — As to the right of accused to plead self-defense in cases where his life was threatened: *Bohannon v. Commonwealth*, 8 Bush, 481; 8 Am. Rep. 474; *Dupree v. State*, 33 Ala. 380; 73 Am. Dec. 422; *State v. Benham*, 23 Iowa, 154; 92 Am. Dec. 417; *Logue v. Commonwealth*, 38 Pa. St. 265; 80 Am. Dec. 481; *State v. Hickam*, 95 Mo. 322; 6 Am. St. Rep. 54, and note; *Noles v. State*, 26 Ala. 31; 62 Am. Dec. 711, and note.

MURDER, statutory degrees of: See extended note to *Whitford v. Commonwealth*, 18 Am. Dec. 774-787.

ANDERSON v. SIMMS.

[29 SOUTH CAROLINA, 247.]

TRUSTS AND TRUSTEES. — RELEASE AND DISCHARGE of a trustee signed and sealed by all parties in interest, and obtained by the trustee by fair and just means, will operate to discharge him from all adult parties interested, and as to them the statute of limitations begins to run from the date of the release. As to an infant party who signs the release, he has one year after attaining his majority in which to contest the validity of the release.

W. A. Holman and C. C. Simms, for the appellants.

L. T. Izlar, for the respondent.

McGOWAN, J. The facts will sufficiently appear from the "agreed statement of the case," which is as follows: —

"Griffin Owens departed this life A. D. 1852, leaving of force and unrevoked his last will and testament, and by said

will the said testator devised to his daughter, Sarah Widener, afterwards Weathersbee, property consisting of lands, money, and negroes, and by said will the testator appointed his son E. D. Owens, trustee, to take, receive, and hold the said property, or the proceeds that might arise from the sale thereof, for the sole and separate use and benefit of his said daughter, Sarah, for and during her natural life, paying to her the annual income thereon, and after the death of his said daughter the estate was to be divided equally between the children of his said daughter as might be alive at that time. The said E. D. Owens accepted the trust imposed by said will, and received property on account of his said wards of various kinds, as before stated, and that shortly after receiving the same the entire trust property was converted into money during the year 1852. These plaintiffs are the surviving children of the said Sarah Weathersbee.

"A bill was filed in the court of equity for Barnwell District, 1853, by the trustee, against Mrs. Weathersbee and two of the plaintiffs, Evan Widener and Estes S. Weathersbee, who were then minors. The purpose of said bill was to allow the trustee to make a sale of a tract of land to his wards, conveying it to them upon the limitations and conditions as set forth in the will of the said testator, and to allow the trustee (E. D. Owens) to appropriate so much of the trust funds in his hands as was necessary for the payment of the purchase-money of said tract of land. The matter was referred to the commissioner in equity, to ascertain the advisability of the sale by the trustee of the said tract of land to his wards, and to report generally upon the amount and condition of the trust estate, and of what it consisted. The commissioner made his report, advising and recommending the sale, and reported further, that after deducting the purchase-money of the said tract of land from the funds in the hands of the trustee, that there still remained a balance of \$360.90, and that the same consisted entirely of money. This report was made February, 1856. The same was confirmed, and the sale ordered to be made.

"Nothing further was ever paid by the trustee to his wards, either *corpus* or interest, until 1873, when the trustee paid to Mrs. Weathersbee two hundred dollars, taking the receipt which is set out in full by the master in his report. When this receipt was signed, the plaintiff Emma L. Anderson was only twelve or thirteen years of age. Both the trustee and

the life tenant are now dead, the life tenant having died 1881, and trustee on October 19, 1873. The trustee, shortly before his death, conveyed all of his real estate to his children named in the master's report herein, for the purpose of a division, in consideration of natural love and affection. The estate of Owens is now totally insolvent, his children having appropriated what personal estate was left to their own use immediately after his death (E. D. Owens's) without any administration being granted. The trustee, Owens, predeceased the life tenant, Sarah Weathersbee, by about nine years," etc.

The master found, as matter of fact, that there was no fraud in the settlement, and bars all of the plaintiffs, except Emma L. Anderson, who, when she signed the release, was an infant thirteen years old, and finds for her \$168.50. To this report there were exceptions, and his honor, Judge Fraser, sustained the exceptions and dismissed the complaint, and from this decree the plaintiffs appeal upon the following exceptions:—

"1. Because the court erred in holding that the plaintiff Emma L. Anderson was charged with notice of the character and conditions of the trust estate, from certain proceedings had in the court of equity in regard thereto, in the year 1856, when as a matter of fact she was not born at that time, and it was error of law for his honor to hold that she was bound by said proceedings; because, as his honor says, 'she could easily have obtained from her trustee and the other plaintiffs a knowledge of the true state of facts.'

"2. Because the court erred in considering any losses that might have been sustained by the trust estate between the years 1856 and 1873, when no such issue had been raised by the pleadings.

"3. Because the court erred in holding that the giving of the receipt to the trustee by the plaintiffs and the life tenant was such a relinquishment and surrender of the life estate by the life tenant to the remaindermen as would cause the accrual of their rights, so that they could bring an action before the death of the life tenant.

"4. Because the court erred in holding that this action was barred by the statute of limitations, and that the statute commenced to run from the date of said receipt, 1873, when, as matter of law, the statute did not commence to run against the plaintiffs until the falling in of the life estate, which was submitted, accrued upon the death of the life tenant and this action, having been commenced within

from the death of the life tenant, the plaintiffs are not barred by the statute.

"5. Because his honor erred in holding that the plaintiff Emma L. Anderson, who was an infant at the time said receipt was given, is bound by the same, and that the statute commenced to run against her from that time.

"6. Because the court erred in holding that the trustee abandoned his trust at the date of said receipt (1873), when, as matter of fact, he continued to exercise the duties thereof, even after said receipt was given, as is alleged in the complaint herein, and admitted by the answer."

There must be a misapprehension in the last ground of appeal, for it clearly appears in the case that the trustee died in the same year (1873) in which the settlement and receipt were given.

As we understand it, the plaintiffs only claim the balance in money, \$360.90, which remained after deducting the price of the land directed by the court to be conveyed to the *cestuis que trust*. After the war (1873), the parties settled upon the payment of two hundred dollars, and the receipt contained these words: "Intended by us as a discharge in full to the said E. D. Owens, as a discharge of all liability as trustee for Sarah Weathersbee and family under the will of Griffin Owens, deceased." There was no evidence of imposition or fraud. The master found, as matter of fact, that the discharge was obtained "by no other than fair and just dealing." In this finding the circuit judge concurred; and by the well-settled rule, this court will not undertake to review it. The adults thereby discharged the trustee.

The only question, then, before us is, whether Emma L. Anderson, who was a minor at the time she executed the receipt and discharge, is barred by the statute of limitations. The master held that she was not barred, and found for her \$168.50; but the judge reversed the finding, and dismissed the complaint as to all the defendants except W. Gilmore Simms, as administrator of the derelict estate of E. D. Owens, the trustee. The trustee, Owens, died in 1873. Sarah Weathersbee, the life tenant, died in 1881, leaving alive her children, the plaintiffs. Emma L. Anderson, the minor, at the execution of the discharge (March, 1873), was about thirteen years of age, and attained her majority in 1881; and the action was not brought until April, 1886, at least five years after. The judge says: "The plaintiff Emma L. Anderson was a minor at the date of

the release, which, as to her, was 'voidable.' It was, however, an act on the part of the trustee 'throwing off the trust.' The remainders were vested; and the act in which the life tenant joined amounted to a surrender to the remaindermen, and, as to adults, the statute of limitations then commenced to run. As to the minor, the statute would have been superseded until she became of age, and formerly would, from that time, have run the whole statutory period before the bar became complete. Under the code as it now stands, the period of protection, if more than six years, could not extend beyond one year after the removal of the disability of infancy. I am not, therefore, able to agree with the master, and think her claim is barred by the statute of limitations," etc.

We agree with the circuit judge that the trustee, at the time the receipt in full and discharge were given, threw off and repudiated his trust, the life estate was relinquished, the remainders vested, and the statute commenced to run: *Ihley v. Padgett*, 27 S. C. 300. It was suspended as to the minor until about 1881, when she attained her majority, and she had one year thereafter within which to bring her action. "The time of such disability is not a part of the time limited for the commencement of the action, except that period within which the action must be brought cannot be extended more than five years by any such disability except infancy; nor can it be so extended, in any case, longer than one year after the disability ceases": Code, sec. 122.

This makes it unnecessary to go into the question as to the liability of the lands of the deceased trustee, in the possession of his heirs under the deeds of gift from him.

The judgment of this court is, that the judgment of the circuit court be affirmed.

TRUSTS AND TRUSTEES. — A trustee can be discharged only by a decree of court, by a provision in the deed, or by consent of all the parties interested: *Ross v. Barclay*, 18 Pa. St. 179; 55 Am. Dec. 616; *Shepherd v. McEvers*, 4 Johns. Ch. 136; 8 Am. Dec. 561.

INFANCY. — An infant may, upon arriving at his majority, vacate a deed of an interest in remainder, even though not yet entitled to possession: *Ihley v. Padgett*, 27 S. C. 300.

AVINGER v. SOUTH CAROLINA RAILWAY COMPANY.

[29 SOUTH CAROLINA, 324.]

COMMON CARRIERS. — Nonsuit should be refused in an action against a carrier for damages for refusing to carry goods for plaintiff, where there is evidence that plaintiff was refused transportation for his goods while the goods of others were carried without objection.

COMMON CARRIERS — RIGHT TO DISCRIMINATE. — In the absence of charter or statutory provisions to the contrary, a common carrier must carry for all who apply, but he may discriminate as to rates so long as no unreasonable charge is made.

COMMON CARRIERS — BRANCH LINES. — While a company, organized and chartered for the transportation of goods, merchandise, and other property, is a common carrier, still, when it constructs a branch line, whether it becomes a common carrier as to such line depends upon the character of use to which it is put, and is a question of fact for the jury.

PLEADING AND PRACTICE. — Request for instructions to the jury involving an opinion on disputed facts is properly refused.

DAMAGES. — IN AN ACTION AGAINST A COMMON CARRIER for refusing to carry goods, the rule of damages is, that if the carrier was honestly trying to enforce his rights without interfering with the rights of others, either maliciously or willfully, the jury must confine itself to actual damages, but when there has been any ill-will or willful disregard of the rights of another, then the jury may give exemplary damages.

ACTION by Avinger against the railway company. In his complaint, plaintiff alleged that the defendant at all the times mentioned therein was a railroad corporation created by and under the laws of South Carolina, and was acting as a common carrier for hire in operating its railway between the city of Charleston and Lamb's Station, in the same state; that the defendant, from the 22d of December, 1884, to June 1, 1885, unlawfully and wrongfully refused to receive, carry, or deliver plaintiff's property for hire between Lamb's Station and Charleston, although the defendant was at the same time receiving, carrying, and delivering for hire the property of other persons between such stations, and that the defendant wrongfully and unlawfully, between the dates named, discriminated against plaintiff in the operation of defendant's railway, in refusing to furnish plaintiff the same facilities for the carrying, receiving, delivering, storing, and handling of his property, as the defendant furnished for other parties for property of like character. The defendant admitted that it was a railway corporation, carrying property as a common carrier for hire between the stations named in plaintiff's complaint; denied all the other allegations of such complaint, and pleaded, for further defense, that its railway track from Ten

Mile Hill, on its main line, to Lamb's Station, on the lands of the Charleston, South Carolina, Mining and Manufacturing Company was constructed at the request of the last-named company, and for its exclusive benefit, and to enable said company to ship phosphate rock, which it was engaged in mining; that the right of way for the railroad as far as it was over the lands of the last-named company was given by it without charge, and it contributed to the expense of building the track, and that when the railway was constructed, it was not expected it would be used by the defendant in the capacity of a common carrier, and it made no provision for depot facilities at its terminus at Lamb's; that some time after the railway was built, the defendant engaged in the general business of transporting freight and passengers, and accepted all freight offered, including that offered by plaintiff, up to January, 1885, at which time the defendant received notice from the mining and manufacturing company forbidding the landing of freights upon its lands; that the defendant was advised by its counsel that it had not acquired such a right as to entitle it, without the consent of the mining company, to land freight at Lamb's, and that it thereafter refused to transport any freight whatever from Charleston to Lamb's Station. At the trial, there was evidence tending to support both the complaint and the answer. After such evidence had been received, the judge charged the jury as follows:—

"After hearing the testimony and argument in this case, and what I had to say to the counsel in the case, upon the motion for nonsuit, it is not necessary that I should say very much to you. If it were not for these requests to charge, I would give you very briefly my view of the whole case, and let you take the record. But I must dispose of these requests to charge. The first thing that a jury has to do is to determine what the issue presented to them is.

"The charge here is, not that the defendant refused to carry goods here for the plaintiff, but that it refused to carry goods for the plaintiff when it carried goods for others; that the defendant refused to carry goods on the same terms for the plaintiff that it carried goods for others; that it discriminated against him; that that was in violation of law, and for that he is entitled to recover damages. I have no right to tell you that a single fact has been proved in this case. I cannot tell you which of the witnesses to believe, or what facts they have proved. All the facts are for you, under the instructions.

"I will now pass upon these requests. The first proposition on behalf of the plaintiff is: 1. 'The jury are instructed that a common carrier, or a public carrier, that is, a railroad company, is bound to carry for all persons all goods offered for transportation by any person whomsoever, for a suitable hire, and that this is the result of the public employment of the railroad company as a carrier, and for failure to receive, carry, and deliver goods so offered, they are liable to an action for damages; that as against a common or public carrier, every person has the same right, and that in all cases where his common duty controls, the defendant company cannot accommodate the mining company, and refuse the plaintiff.' By substituting 'one person' in place of 'the mining company,' I charge you that that is a correct proposition of law.

"2. 'The jury are further instructed that if they find that the South Carolina Railway Company refused to carry the plaintiff's goods over their road, or any part or branch thereof, while they were carrying the goods of any other person or persons, or corporation, and discriminated against the plaintiff, then the plaintiff for such discrimination is entitled to recover the damages thereby sustained by the plaintiff.' That, I think, is good law.

"3. 'And the jury are further instructed that the road of the South Carolina Railway Company includes all the road in use by said company, whether owned or operated under a contract or lease by the South Carolina Railway Company; and if the jury find, from the evidence, that the road from Charleston to Lamb's Station was, during the times of discrimination complained of, in use by the South Carolina Railway Company, then they are thereon responsible for discrimination and damages therefrom as for any other part of their road.' I think that is correct.

"4. 'And the jury are further instructed that if they find, from the evidence, that the defendant, the South Carolina Railway Company, operated by steam the railroad between Charleston and Lamb's, and that the defendant company was doing business as a public or common carrier on such road, then the defendant would be liable for all acts of discrimination against the plaintiff.' I think that is correct.

"5. 'And the jury are further instructed that in this case it makes no difference by whom this railroad was laid out and constructed; and if the jury find that the defendant company was maintaining and operating said road, then the defendant

company would be liable to the plaintiff for any damages proven, from all acts of discrimination against the plaintiff, and refusing to carry the goods of the plaintiff on the same terms when it carried the goods of another.' I will add to this: 'If it did so carry the goods of another,' I think the proposition is correct.

[Propositions 6, 7, and 8 were withdrawn.]

"9. 'The jury are instructed that if they find the discriminations and damages to plaintiff, as alleged, the time admitted by defendant in its answer, during which they carried goods for persons other than the plaintiff to Lamb's Station, was from the 15th of January, 1885, to the 1st of June, 1885, and the damages of the plaintiff within that time would be the amount plaintiff would be entitled to recover in such case.' I don't know that I can charge you that, for the reason that I think it requires me to charge you upon a question of fact. It is true that the answer admits that certain things were done between January and June, and you may find the discrimination, but I don't think I have the right to charge you on that fact.

"I am requested by counsel for defendant to charge you as follows: 1. 'That if the jury find, from the evidence, that the railroad company carried freight from Charleston to Lamb's from the time it refused to carry for Avinger, until the 1st of June, 1885, for the mining company alone, and that the freight for the mining company was delivered on a private platform of the mining company, then the railroad had a right to refuse to carry Avinger's freight there, and he cannot recover.'

"I cannot charge you that proposition. I think the law is this: When the defendant constructs a branch of its road and operates it with its own engines, cars, and employees, even though it may be such a branch as it had no right to construct without the consent of the owners of the land through which it passes, such branch road is operated under all the liabilities to the public which attach to the main lines. If the company carries passengers at all, it must carry all alike. If it carries freight for one, it must carry freight for all on the same terms. If the company has any legal existence at all as to such branch, it must have all the liabilities of a common and public carrier. Such a liability is as much a part of its existence as the power to make contracts or to do any other acts. Any other construction of the law would put the whole

commerce of the country under the absolute control of the railroads. In the view I take of this case, therefore, it is not material whether the defendant had a right to condemn the right of way and of sites for depots or not. As to the public, the company is estopped from saying that it has exceeded its charter powers. I cannot, therefore, charge you that that first proposition is good law.

"2. 'That the action is at common law, and no penalties under any statute can be recovered.' That is correct. They are confined to actual damages, unless this is a case for exemplary damages.

"3. 'That punitive or vindictive damages cannot be recovered under the evidence in this case; but the damages must be the direct result of the refusal to carry, or discriminations proved.' The rule is this: Wherever an act is done by a defendant, and he is sued for it, and the jury think that he has been trying honestly to carry out his rights without interfering with the rights of others, maliciously, willfully, or otherwise, then the jury should confine themselves to actual damages. But whenever there has been any ill-will or willful disregard of the rights of another, then the jury is at liberty, in a case like this, to give exemplary damages. In any event, the damages must be within the amount claimed, viz., two thousand dollars."

Verdict for plaintiff. Defendant appealed.

Brawley and Barnwell, for the appellant.

Bryan and Bryan, for the respondent.

SIMPSON, C. J. The character of this action and of the defense will be seen from the complaint and answer, copies of which are hereto appended.

At the close of plaintiff's testimony, the defendant moved for a nonsuit, which was refused, his honor saying that "it is by no means clear what are the rights of the railroad company over the land of the land-owners over which this branch runs. It might be that under the statute they had no right to condemn that land. The difficulty with me is, that if the railroad is there at all, is it not there under the organic law of its being? and if there, is it not forever estopped from saying that it has exceeded its charter powers? I am inclined to think that, without holding themselves out as common carriers at all, they were common carriers to Lamb's; otherwise, they had no

right to be there. They ceased to be a corporation at Lamb's. I must therefore refuse the motion for nonsuit."

The case then proceeded, when, at the conclusion of the testimony, several requests to charge, both from the plaintiff and defendant, having been made, his honor charged as follows: (See charge, with defendant's (appellant's) exceptions appended.)

Upon an examination of the testimony reported in the case, we have found that there was enough offered to carry the case to the jury, and therefore there was no error in overruling the motion for nonsuit.

Nor was there error on the point raised in the first exception. While it is true that at common law, and in the absence of charter or statutory regulations to the contrary, a common carrier may discriminate as to rates, so that no unreasonable charge is made, yet he must carry for all; because it is a leading principle of the common law, applicable to all common carriers, that they are bound to carry for all, and for a reasonable remuneration. In *Johnson v. Pensacola and Perdido R. R. Co.*, 16 Fla. 623, 26 Am. Rep. 731, the following language was used, which succinctly embodies the common-law doctrine on this subject, to wit: "That as against a common or public carrier, every person has the same right, that in all cases, when his common duty controls, he cannot refuse A and accommodate B; that all, the entire public, have the right to the carriage for a reasonable price at a reasonable charge for the services performed, and the commonness of the duty to carry for all does not involve a commonness or equality of compensation or charge; that all the shipper can ask of a common carrier is that for services performed he shall charge no more than a reasonable sum to him." This principle was recognized and enforced in our case of *Ex parte Benson & Co.*, 18 S. C. 42, 43; 44 Am. Rep. 564. See also cases cited therein. The argument of appellant's counsel, on the above exception, seems to have been directed entirely to the point that there might be discrimination as to rates of transportation, as laid down above; but the charge of his honor, assailed in the first exception, did not conflict with this principle. The judge said nothing as to rates. His remarks were confined to persons, and he ruled that a railroad was bound to carry for all, making no discrimination as to the right to ship. In this, as we have said, there was no error: Chitty on Contracts, 11th ed., 682 et seq.; Kent's Com.; *Ex parte Benson & Co.*, *supra*.

The second exception assigns error because his honor charged "that the road of the South Carolina Railway Company includes the road in use by said company, whether owned or operated under a contract or lease by the South Carolina Railway Company; and if the jury find, from the evidence, that the road from Charleston to Lamb's Station was, during the times of discrimination complained of, in use by the South Carolina Railway Company, then they are thereon responsible for discrimination and damages therefor as for any other part of their road."

The main question below was, whether the defendant was a common carrier as to the branch to Lamb's. If it was, then the common-law doctrine as to liability of common carriers, as announced above, applied to the case; but the preliminary and vital question involved was, whether the defendant was a common carrier on said branch. This, it seems to us, was a question of fact, and consequently a question for the jury. What constitutes a common carrier, and how and when one can become such carrier, are questions of law as applied to the facts found, as also his responsibility. There can be no doubt that a railroad company organized and chartered for the transportation of goods, merchandise, and other property, is a common carrier, and would be so independent of any declaration to that effect in its charter; such being the very purpose of its creation. But its character of common carrier can extend only to the road which it may be incorporated to construct or which it may operate by virtue of its charter. No doubt the defendant, under its charter, and the acts referred to by respondent's attorney, has been invested with power to construct branches to its main track; and wherever this may be done for the purpose of transportation, it will become under said charter a common carrier as to such branches, subject to the law governing carriers. So, too, it has authority to operate other roads by contract or lease for transportation purposes, and whenever it may do so, it becomes a common carrier upon such roads. But when a question arises whether or not it has become a common carrier as to such branch or road, this must depend upon the testimony, bearing upon the fact, whether the alleged road is operated for the purposes suggested, and not simply whether it has been used or is "in the use" of said company for any purpose.

Suppose, for instance, that the defendant owned a body of timber-land some miles from its main track, and that for its

own purposes in procuring cross-ties, stringers, and other lumber for repairs, it should construct a track to said lands, using its engines and cars thereon for the transportation of said lumber to the main track, and for no other purpose, could it be claimed that the company would become a common carrier thereon, and be bound to receive and transport all freight that might be offered? We think not. The question in such cases must turn on the object and purpose of the branch constructed and the road operated, and this is a question of fact, dependent not simply, as we have said, upon the use, but upon the character of the use. We think, therefore, that his honor was in error when he charged the jury "that if they found, from the evidence, that the road from Charleston to Lamb's Station was, during the times of discrimination complained of, in use by the South Carolina Railway Company, then they are thereon responsible for discrimination and damages therefor, as for any other part of their road."

So, too, we think his honor enlarged the test of becoming a carrier too much in the propositions excepted to in the third and fourth exceptions, in which he ruled that if defendant maintained and operated said road, or run its own engine and cars upon it, whether under its charter it had the right to construct it or not, it would become a common carrier thereon, "with all the liabilities to the public which attend the main lines." True, these general propositions were accompanied with the statement that if goods were carried for one, they must be carried for all, and if passengers were carried at all, all alike must be carried; which latter statements were correct, provided the position of carrier had once been established; but the propositions of law likely to mislead the jury preceded these statements, where his honor charged that maintaining and operating the road, running its engine and cars upon it, made the defendant a common carrier thereon, without regard to the purpose and object of thus maintaining and operating it. Upon the facts of this case the jury may have been warranted in finding the defendant a common carrier to Lamb's Station. Of this, however, we intimate no opinion; we only decide that his honor's charge was erroneous in enlarging too far the facts to be considered by the jury as determining the question whether the defendant had become a common carrier to said station, or rather, in holding, as matter of law, that the facts mentioned, if found by the jury, would establish the position of a common carrier in the defendant.

There was no error in refusing defendant's requests, as found in exceptions 5 and 6. Both of these requests involved the holding, on the part of the judge, the fact that the position of a common carrier had not been established against the defendant, which, as we understand the case, was a question entirely for the jury, dependent upon the force and effect of the testimony. And we may add that, as to the sixth exception in regard to punitive or vindictive damages, the rule laid down by his honor was unobjectionable.

It is the judgment of this court that the judgment of the circuit court be reversed.

COMMON CARRIERS — WHAT ARE REASONABLE AND UNREASONABLE DISCRIMINATIONS BY RAILWAYS: See extended note to *Root v. Long Island R. R. Co.*, 11 Am. St. Rep. 647-655.

TAYLOR v. GLENN.

[20 SOUTH CAROLINA, 292.]

BOUNDARIES — DECLARATIONS OF FORMER OWNER AND ADJOINING PROPRIETOR. — In an action involving a disputed boundary, consisting of a river, declarations by a former owner, under whom plaintiff claims, made forty years before the suit, and also declarations made by an adjoining proprietor, that the river has changed its bed, are inadmissible.

R. E. and R. B. Allison, for the appellants.

Ira B. Jones, for the respondent.

MCGOWAN, J. The judge who settled this case stated that "the case proposed in this appeal is greatly contrary to the rule of the supreme court which forbids all testimony except such as bears upon the rulings of the judge as appealed from." We advert to this very just remark for the purpose of again calling the attention of the gentlemen of the bar to the growing habit of printing the testimony as it was offered on the stand, leaving it for the court to eliminate, if possible, the precise points proper for its consideration. In an action at law, this is not such "a case" as the rule requires, and necessarily leads to great labor and confusion.

It seems that this is the second action by the plaintiff for the recovery of a small strip of land in possession of the defendants, lying along a branch called for as the boundary line between them. The plaintiff contends that since the time her predecessors or grantors came into possession, to wit, since

1797, this branch has changed its bed more to the east, and now runs through her land, cutting off about seven acres of her land on the west side of the present channel of the branch. The defendants contended that the branch never has changed, and that it runs now where it originally ran, and they insist that what the plaintiff claims to be the changed bed of the branch is now, and always has been, the boundary line between the two adjoining tracts; and, as a consequence, they claim the seven acres immediately on the west side of the present bed of the branch as their own land. And besides, they pleaded the statute of limitations in bar of plaintiff's recovery.

The cause came on to be heard by Judge Pressley and a jury, and there was a second verdict for the defendants. A large mass of testimony is printed in the brief, but not the charge of the judge. In the effort to ascertain whether there was error of law committed by the judge, it will be necessary to take up the exceptions *seriatim*, which for the most part relate to alleged error of the judge in excluding certain testimony.

First exception: "That the judge erred in ruling out certain testimony of John D. Nesbit, and refusing to let him testify on the trial that 'the stake,' which stands (according to the testimony of a number of witnesses) on the west side of the old bed of the branch as represented on Surveyor Clark's plat, was generally known and called 'Ramsey's stake,'—Ramsey being the owner of the land on the west side of said branch prior to the time the same was vested in the defendants in this action." We have looked through the brief, and we fail to find any foundation for this exception. The case states: "Nesbit was asked if he had heard it called Ramsey's stake. Defendants objected. The judge ruled that it was competent to prove that McMurray had so called it, he being in possession, and that would show his claim of possession. Under this ruling, Nesbit testified that he had not heard either McMurray or Ramsey, who was in possession on the west side of the branch, speak of that stake as a corner or boundary, but both claimed the branch." No further exception appears.

Second and sixth exceptions complain of the exclusion of the testimony of Ned McCorkle, Mrs. Taylor, John D. Nesbit, Bob Hood, and others, as to the alleged declarations of W. Harper McMurray, made at the time he was in possession of the land of plaintiff (1842-43), "that the old bed of the branch,

as it ran down around the hills, was the dividing line between him and the Ramseys," etc. Was it error to exclude these alleged declarations of McMurray, that the old bed, and not the running stream of the branch, was his line? The action was really for the recovery of land, in which the plaintiff must recover upon the strength of his own title, and the question of boundary was only incidentally involved as a matter of location. These declarations of McMurray, when he owned the Taylor land on the east side of the branch, are alleged to have been made more than forty years ago, and were in his own interest, as extending his land across the running branch to where he claimed that it formerly ran. The rule certainly is, that hearsay evidence is not admissible, and in reference to lands, even parol will not always suffice to prove title. It is hardly necessary to say that great caution should be exercised in the application of any rule which is opposed to this general and well-settled principle on the subject of evidence.

It is earnestly urged, however, that there is at least one exception,—that declarations of a deceased person may be received on questions of boundary between private estates. In the first place, it does not strike us that this is a case of boundary in the sense of the rule. There was no question of doubt as to the boundary, which was the branch. There was no question as to what was called the old bed. It was not difficult to locate, like the imaginary line of a surveyor. Under the pleadings, the only issue of fact was, whether the branch ever ran in what was called the old bed, which seems to have been decided by the jury in the negative for the defendants. The alleged declarations of the McMurray family go only to point that claim was asserted to the old bed, assuming, as it seems (for that affords no proof of the fact), that the branch at some remote period must have run there, and afterwards changed its channel. We can understand how the declarations of one in possession may be received as showing the extent and character of that possession, and that in certain cases of that kind the doctrine of *res gestæ* may be applicable. But we cannot understand how such declarations of claim (mere opinion) can afford evidence of the fact that the branch had changed its bed, and therefore the title is in the plaintiff.

This court has lately had the subject of such declarations under consideration in the case of *Sexton v. Hollis*, 26 S. C. 236, in which Mr. Justice McIver, in delivering the judgment of the court, said: "In this country, however, the exceptions

seem to have been extended so as to render such testimony admissible in cases of boundaries between private estates (*Ellicott v. Pearl*, 10 Pet. 412), as well as to admit the declarations of deceased persons who shall appear to have been in a situation to possess the information, and not interested, on questions of boundary between private estates, as, for instance, the declarations of surveyors, chain-carriers, etc.: *Spear ads. Coate*, 3 McCord, 227; 15 Am. Dec. 627; and other authorities. But we are not aware of any other exception which has been recognized either by the courts of this country or of England, and as we are admonished by Chief Justice Marshall, in *Mina Queen v. Hepburn*, 7 Cranch, 290, of the danger of allowing fresh exceptions to a well-settled and highly salutary rule of evidence, we are not inclined to do so," etc. This covers the case of *McMurray*, who was directly interested in disregarding the branch as it runs, and claiming to what is called the old bed. To allow such declarations in support of title would be both novel and dangerous.

The third exception complains that it was error to rule out the testimony of W. R. Dunn as to alleged declarations of David Hood, an adjoining land-owner (deceased at the time of the trial), "that the original bed of the branch, up at the head, and near to his land, as represented on Clark's plat, and running round close to the hills, was the line between William Harper McMurray and the Ramseys. And he erred in also ruling out the testimony of John Wallace, wherein he offered to testify that in the year 1874 [when] he first cleared or readied up a part of the land in dispute for Mr. Glenn, J. H. McMurray, now deceased, a son of William Harper McMurray, stopped him from clearing, and told him after that year he must work no more on the land." What we have already said in regard to the alleged declarations of William Harper McMurray applies to these of Mr. Hood, except that it was not shown that Mr. Hood had an interest in the subject-matter. It did not appear, however, that he had any special knowledge—like that of a surveyor or chain-carrier—of the meanderings of the branch, so as to make him an exception to the rule above stated. The alleged declarations as to where the line ran "between the Ramseys and William H. McMurray," unconnected with any certificate that the branch had changed its course, cover more than mere opinion. Besides, it was stated and rather confirmed by what appears in the br

declarations to Dunn, a surveyor in the cause, were made *post litem motam*.

Exceptions 4, 5, and 7 relate entirely to questions of fact, and to alleged insufficiency of proof, which this court has no right to consider. The charge is not given, and we have therefore had no aid from the views of the learned judge below; but we have not been able to discover any error of law for which we would be authorized to order a new trial.

The judgment of this court is, that the judgment of the circuit court be affirmed.

BOUNDARIES. — As to what declarations are admissible to prove disputed boundaries: Extended note to *Putnam v. Fisher*, 36 Am. Rep. 749, 750; extended note to *Curtis v. Aaronson*, 60 Id. 589-591. As to the admissibility of hearsay testimony to prove boundaries: Extended note to *Coste v. Spear*, 15 Am. Dec. 629-631. In a case of disputed boundary lines, the declarations of a grantor at and before the time of his conveyance are admissible against him and those claiming under him: *Sharp v. Blankenship*, 79 Cal. 411.

CITY COUNCIL OF ANDERSON v. O'DONNELL.

[29 SOUTH CAROLINA, 355.]

MUNICIPAL CORPORATIONS. — Under the charter of the city of Anderson, an offender against a municipal ordinance has no right to demand a trial by jury before the mayor in the first instance.

STATUTES — CONSTRUCTION. — An act amendatory of an act which went into effect upon its passage also goes into effect at the time such amendment is passed.

STATUTES — CONSTRUCTION. — An act amendatory of an act, but which does not change the nature of the offense, nor the nature or amount of evidence necessary to prove the charge, nor the nature or amount of punishment, but simply changes the mode of trial, is not an *ex post facto* law.

JUDICIAL NOTICE — MUNICIPAL CORPORATIONS. — The mayor may take judicial notice of the due publication of the ordinances of a city.

STATUTES — CONSTRUCTION. — Where a statute provides that "in all cases appealed to the city council the mayor shall preside, and the aldermen shall sit as a jury to try the facts involved, and may also reverse, modify, or affirm any or all of the rulings of the mayor in the first trial of the case," an appellant has a right to a trial *de novo* before the full council.

CONSTITUTIONAL LAW — RIGHT OF TRIAL BY JURY. — General constitutional provisions securing the right of trial by jury relate only to that character of cases in which the right existed at the time of their adoption. Therefore, if municipal courts had the right to try, without a jury, offenders for violating ordinances at the time of the adoption of the constitution, they still have the power, notwithstanding the fact that the constitution secures to all the right of trial by jury.

CONSTITUTIONAL LAW.—The same wrong may constitute an offense both against the state and a municipal corporation, and both may punish it without violating any constitutional principle; and this, though prosecutions in the state and municipal court are taking place at the same time.

Prince and Vandiver, and E. B. Murray, for the appellant.

Wells and Orr, and W. S. Brown, for the respondent.

McIVER, J. In February, 1888, the defendant was charged before the mayor of the city of Anderson with the violation of one of the ordinances of the said city, in selling spirituous liquors without a license on January 2, 1888. It being admitted that the appellant had been arrested under a warrant issued by a trial justice, and bound over for trial in the court of sessions for the same act of selling, his counsel submitted a motion to dismiss the case upon the ground that the same case was pending in the court of sessions, and, therefore, the mayor's court was without jurisdiction, which motion was refused. Appellant then demanded a trial by jury, which was likewise refused, and the mayor proceeded to try the case, without a jury, during which the various points hereinafter specified were made and overruled, and appellant was convicted and sentenced "to pay a fine of seventy-five dollars or thirty days' work on the streets of Anderson."

Thereupon defendant appealed to the city council, and the case was heard by the full council. On the call of the case, the council determined first to pass upon the several points of law ruled by the mayor, all of which were affirmed. The mayor then swore the aldermen to try the case as a jury, at which trial the mayor presided. Appellant then moved that the witnesses be produced, and the evidence retaken in the presence of the full council, but this motion was refused, and the council proceeded to try the case upon the evidence taken by the mayor at the first trial. At this trial, defendant was again convicted, and thereupon he appealed to the circuit court upon the several grounds mentioned in the judgment of that court. That appeal was heard by the court of sessions, and his honor, Judge Norton, presiding, rendered judgment dismissing the appeal, and the defendant now appeals to this court upon the several grounds set out in the record.

These grounds raise substantially the following questions:
1. Whether there was error in refusing to dismiss the case upon the ground that another prosecution was pending in the court of sessions against the defendant for the same act of

selling; 2. Whether there was error in refusing to allow the defendant a trial by the full council in the first instance; 3. Whether the trial should have been had under the original charter, or under the charter as amended; 4. Whether there was error in holding that the mayor might take judicial notice of the fact that the ordinance under which defendant was tried had been duly published; 5. Whether the trial by the full council should have been *de novo*, or on the evidence taken in writing by the mayor on the first trial; 6. Whether defendant was entitled to a trial by jury.

The first question will be passed over for the present, and taken up in connection with the sixth.

As to the second question, it does not distinctly appear in the statement of the case as prepared for argument here that the defendant made any demand for trial by the full council in the first instance. But waiving this, and conceding that such demand was made, we are unable to find anything, either in the original or amended charter of the city of Anderson, which would warrant such a demand. They both provide for a trial by the mayor in the first instance, with a right of appeal to the full council.

For a full understanding of the third question, it will be necessary to state that the original charter of the city of Anderson, granted by the act of February 9, 1882 (17 Stats. 972), was amended in several particulars by an act approved December 24, 1887 (19 Stats. 950), and that while the former act contained a provision declaring that it should take effect immediately upon its passage, the latter act contained no such provision; and therefore it is argued that the act amending the charter did not take effect until the twentieth day after its approval by the governor under the provisions of the act of December 23, 1879 (17 Stats. 69), and inasmuch as the act of illegal selling with which defendant was charged took place on January 2, 1888, within the twenty days after the approval of the act amending the charter, that act had not then taken effect, and hence his trial under that act was a violation of the *ex post facto* clause of the constitution.

It will be observed, however, that the amendatory act, in so far as it concerns our present inquiry, reads as follows: "That an act entitled 'An act to incorporate the city of Anderson,' approved February 9, 1882, be, and the same is hereby, amended by striking out section 6 thereof, and inserting the following in lieu thereof, to wit"; and then follows the lan-

guage of the section directed to be inserted in the original charter. This amendatory provision having thus been incorporated in and made a part of the original charter, it may well be questioned whether it did not thus become affected by and subject to the provisions of the twenty-first section of the original charter, whereby it is declared "that this act shall go into effect immediately upon its passage": *Nichols v. Briggs*, 18 S. C. 482. Of course we do not mean to intimate that the provisions of the amendatory act could be applied to anything done prior to its passage; for the rule is, that when a statute is amended by declaring that it shall read in a given way, the amendment has no retroactive force (*Potter's Dwaris on Statutes*, 165), but simply this, that inasmuch as the original charter contained a provision declaring that it should go into effect immediately upon its passage, the amendment, which is in terms made a part of the original act, might, under the same provision, take effect immediately upon its passage. If, therefore, the amended charter be regarded as having taken effect on the day of its passage (December 24, 1887), then clearly the amendatory act is not subject to the objection urged against it, as *ex post facto* legislation; for the act with which appellant is charged was not done until January 2, 1888, several days after the adoption of the amendment.

But waiving this, and assuming that the amendatory act did not take effect until the twentieth day after its approval by the governor, it is still necessary to inquire whether such act is obnoxious to the constitutional provision forbidding the enactment of *ex post facto* laws. It is conceded that every law which has a retroactive effect is not necessarily an *ex post facto* law in the sense of this constitutional provision; for a law which simply affects the remedy or mode of proceeding, or the court in which the remedy is obtained, does not come in conflict with such provision. See *State v. Sullivan*, 14 Rich. 281, where it is said: "It has been expressly held that a statute creating a new court, or conferring a new jurisdiction, or enlarging or diminishing the powers of an existing court, is not an *ex post facto* law"; citing *Wales v. Belcher*, 3 Pick. 508; *Commonwealth v. Phillips*, 11 Id. 28. Now, this is precisely the nature of the change of the law by the amendment to the charter of the city of Anderson. There was no change in the nature of the offense, or of its constituent elements, in the nature or amount of the evidence necessary to sustain the charge; nor was the nature or amount of the

altered. It was simply a change in the mode of trial. We do not think, therefore, that such an amendment can be properly regarded as an *ex post facto* law.

The case of *Kring v. Missouri*, 107 U. S. 221, relied on by counsel for appellant, we do not think is in point. In that case, the appellant had pleaded guilty of murder in the second degree, and upon appeal from the judgment rendered upon such plea, the judgment was set aside, and a new trial ordered, upon the ground that appellant had been misled into entering that plea. He was then tried again and convicted of murder in the first degree, when he appealed again, upon the ground that, under the law of Missouri as it stood at the time the homicide was committed, the acceptance of a plea of guilty of murder in the second degree operated as an acquittal of the charge of murder in the first degree. It appeared, however, that after the homicide was committed, but before the plea of guilty was accepted, the law had been changed, so as to abrogate the rule previously established as to the effect of the acceptance of the plea of guilty of murder in the second degree when the judgment rendered thereon has been set aside, and to declare that when such judgment has been set aside, the former trial is to be regarded as a mistrial, and the new trial is to be had as if there had been no previous trial or judgment. So that the only question before the supreme court of the United States was, whether this change in the law was *ex post facto* in its character, when applied to appellant's case, and that court, by a bare majority, held that it was.

The main ground of their decision, however, seems to have been that the change in the law did not merely affect the mode of proceeding, but deprived the appellant of the protection which, under the old law, the former judgment would have afforded him; for it was conceded that, under the law as it stood at the time the homicide was committed, he could never have been convicted of murder in the first degree after judgment rendered on his plea of guilty of murder in the second degree, even though that judgment was subsequently set aside. As Mr. Justice Miller, in delivering the opinion of the majority of the court, said, the new law "so changes the rule of evidence that what was conclusive evidence of innocence of the higher grade of murder when the crime was committed, namely, a judicial conviction for a lower grade of homicide, is not received as evidence at all, or if received, is given no

weight in behalf of the offender. It also changes the punishment; for, whereas the law as it stood when the homicide was committed was that, when convicted of murder in the second degree, he could never be tried or punished by death for murder in the first degree, the new law enacts that he may be so punished, notwithstanding the former conviction."

Counsel for appellant also relies upon certain language of Mr. Justice Washington, in *United States v. Hall*, 2 Wash. 366, quoted with approval in *Kring v. Missouri*, *supra*. That language fully quoted is as follows: "An *ex post facto* law is one which, in its operation, makes that criminal which was not so at the time the action was performed, or which increases the punishment, or, in short, which, in relation to the offense or its consequences, alters the situation of a party to his disadvantage." And again, he adds, by way of application to that case, which was for a violation of the embargo laws: "If the enforcing law applies to this case, there can be no doubt that, so far as it takes away or impairs the defense which the law had provided the defendant at the time when the condition of this bond became forfeited, it is *ex post facto* and inoperative."

Now, it is quite clear that the amendment to the plaintiff's charter does not in any respect change the punishment to which the appellant was liable under the original charter, nor does it alter any rule of evidence then existing, nor does it "in relation to the offense or its consequences" alter the situation of appellant, nor does it take away or impair any defense which under the old law he might avail himself of. It seems to us clear, therefore, that there is nothing in either of the cases relied on applicable to the case under consideration.

The fourth question is disposed of by the case of *City Council of Charleston v. Chur*, 2 Bail. 164, where the point is distinctly ruled adversely to the view contended for by the appellant.

On the fifth question we cannot concur in the view taken by the circuit judge, and upon this ground there must be a new trial. This question turns upon a proper construction of the sixth section of plaintiff's charter as amended by the act of December 24, 1887. That section empowers the mayor to try all offenders against the ordinances of the city, in a summary manner, without a jury, with the right to the party feeling himself aggrieved of appeal to the city council, provided he gives the proper notice and security "to appear and defend"

before the city council. The final provision is in these words: "In all cases appealed to the city council, the mayor shall preside, or some alderman as hereinbefore provided, and the aldermen shall sit as a jury to try the facts involved, and may also reverse, modify, or affirm any or all of the rulings of the mayor in the first trial of the case."

It seems to us that this language plainly implies that "in all cases appealed to the city council" the trial must be *de novo*, and the witnesses must be examined before the council just as though there had been no previous trial. It will be observed that the provision is, that "the aldermen shall sit as a jury to try the facts involved," and this necessarily implies that the witnesses are to be sworn and examined just as in other cases of jury trial; for we know of no instance where that mode of trial is prescribed, in which the presence of the witnesses can be dispensed with except by consent, and except where their testimony is permitted to be taken by commission. It seems to us that it would be a contradiction in terms to say that, when the statute expressly declares that the aldermen "shall sit as a jury to try the facts involved," they may nevertheless try such facts in a way totally unknown to a jury trial. We can conceive of no other reason why the words just quoted should have been inserted in the statute, except for the purpose of showing that the cases appealed to the city council were not to be heard as appeals usually are, but that the facts involved were to be tried by the aldermen sitting as a jury, in the only mode recognized in that mode of trial.

We do not think that the additional words, "and may also reverse, modify, or affirm any or all of the rulings of the mayor in the first trial of the case," can have the effect of qualifying the conclusion to which the previous words, "shall sit as a jury," manifestly point. On the contrary, these additional words show the purpose to confer upon the aldermen two different and distinct powers: 1. To try the facts involved sitting as a jury; 2. To reverse, affirm, or modify the law as ruled by the mayor. This is apparent from the use of the word "also," "and may also reverse," etc., which shows that an additional power was intended to be conferred, and that the province of the aldermen was not to be confined merely to trying the facts involved, but that they should also have power to review the law as applied by the mayor, to which the word "rulings" clearly points, as that is a word peculiarly appli-

cable to a legal question, and is seldom, if ever, applied to a finding of fact.

It seems to us that the language of the statute clearly indicates that the intention was, "in all cases appealed to the city council," that the whole case, both fact and law, should be retried, *de novo*, and not heard as appeals usually are. There are other expressions in the statute which point to the same conclusion. The trial by the mayor is spoken of as "the first trial of the case," manifestly contemplating a second trial by the council, and not a mere appeal; for the hearing of an appeal in the usual form is not, properly speaking, a trial of the case: See *State v. David*, 14 S. C. 433; *State v. Jefcoat*, 20 Id. 386. Then, again, the condition of the bond which defendant must give in order to carry his case before the full council is, not to appear and prosecute his appeal, which would be the most appropriate language, if the intention was to give him a mere right of appeal, but the language is, "to appear and defend," just such language as would be appropriate to a retrial, or a second trial of the case.

The sixth question involves the appellant's right to a trial by jury. This right is claimed under three sections of the constitution, to wit, article 1, section 11, which declares: "The right of trial by jury shall remain inviolate"; section 13, which declares that every person charged with any crime or offense shall have the right to a speedy and public trial "by an impartial jury"; and section 14, which declares that "the general assembly shall not enact any law that shall subject any person to punishment without trial by jury." To give these provisions the extensive effect claimed for them in the argument of one of the counsel for appellant would result in depriving the legislature of the power of investing a municipal court with jurisdiction to try, without a jury, one who violates any ordinance of such municipality; for if, as is well settled (*State ex rel. Burton v. Williams*, 11 S. C. 292), every ordinance passed by a municipal corporation derives its authority from the legislative power of the state, and if, as is argued, the general assembly has no power to enact any law subjecting a person to punishment without a trial by jury, then it would follow necessarily that the legislature could not, either directly or through the legislative power it may confer upon a municipal corporation, provide for the trial without a jury of a person for violating any ordinance of a municipal corporation. But, so far as we are informed, there is no text-writer and r

case which goes to this extent. Even Judge Dillon, in his work on municipal corporations (vol. 1, sec. 433, 3d ed.), the authority principally relied on by appellant, expressly admits that "violations of municipal by-laws proper, such as fall within the description of municipal police regulations, . . . the legislature may authorize to be prosecuted in a summary manner, by and in the name of the corporation, and need not provide for a trial by jury."

But what is conclusive upon this point is, that the view contended for is directly in conflict with the recent decision of this court in *Ex parte Schmidt*, 24 S. C. 363. Indeed, the constitution itself seems to recognize what we shall presently see was the well-settled doctrine, that these special provisions securing the right of trial by jury related only to those cases, or rather to that character of cases, in which the right existed at the adoption of the constitution. For, recognizing the fact that prior to the adoption of the constitution offenses of a certain character were triable by inferior courts without a jury, it provides, in section 19 of article 1: "All offenses less than felony, and in which the punishment does not exceed a fine of one hundred dollars, or imprisonment for thirty days, shall be tried summarily before a justice of the peace, or other officer authorized by law," etc. Here the language is imperative, "shall be tried before a justice of the peace or other officer," and there is no provision for a jury. This, it seems to us, was intended to show that, notwithstanding the previous provisions securing the right of trial by jury, a certain class of offenses, of a minor character, should be tried before an inferior tribunal, as they had been prior to the adoption of the constitution.

As we have said, the well-settled doctrine, in this state at least, as well as in many other states, is, that these general constitutional provisions securing the right of trial by jury are to be read in the light of the law existing at the adoption of the constitution. They were not designed to extend the right of trial by jury, but simply to secure that right as it then existed. To use the language of Wilds, J., in *White v. Kendrick*, 1 Brev. 471, these provisions "established an epoch from which legislative innovation on the trial by jury should cease." And after mentioning several tribunals, such as courts of equity and ordinary, courts-martial, and courts of justices of the peace, in which the right of trial by jury was never recognized, he adds: "They are, however, exceptions which were

familiarly known at the adoption of our constitution, and were intended to be as inviolably preserved in that instrument as the rule itself." To the same effect see the remarks of Earle, J., in *State v. Maxcy*, 1 McMull. 501, and of O'Neill, J., in *State v. Simons*, 2 Speers, 761. See also *State v. Glenn*, 54 Md. 572, where it is said: "When it is declared that a party is entitled to a speedy trial by an impartial jury, that must be understood as referring to such crimes and accusations as have, by the regular course of the law and the established modes of procedure, as theretofore practiced, been the subjects of jury trials." See also *McGear v. Woodruff*, 33 N. J. L. 213, where it was held that such a constitutional provision does not prevent the enforcement of municipal ordinances without a jury trial.

It is clear, therefore, that as municipal courts had the power to try offenders for violating the ordinances of the municipality without a jury, at the time of the adoption of the constitution, they still have that power, notwithstanding the several provisions of that instrument invoked by the appellant.

It is contended, however, that the jurisdiction of a municipal court is limited to the trial of such offenses as are not embraced under "the general criminal legislation of the state," and that where the act charged constitutes an offense against the criminal law of the state, a person charged with such act cannot be tried by a municipal court without a jury, even though such act may also be a violation of an ordinance of the municipality; and such seems to be the view of Judge Dillon. This view seems to be based upon the idea that otherwise a person might be liable to be tried and punished twice for the same offense; and this involves the first question presented by this appeal. As to this question there seems to be no little conflict of opinion, and authorities of high respectability might be cited on both sides.

The courts of this state have, however, inclined to the view adopted by Judge Cooley, where he says, in his valuable work on constitutional limitations, page 199: "The same act may constitute an offense both against the state and the municipal corporation, and both may punish it without any violation of any constitutional principle"; and in a note cites numerous cases to support that view. In one of those cases (*Mayor of Mobile v. Allaire*, 14 Ala. 400), in which the validity of an ordinance imposing a fine of fifty dollars for an assault¹ battery committed within the limits of the city was in

Collier, C. J., uses the following language, which seems peculiarly appropriate to the case under consideration: "The object of the power conferred by the charter, and the purpose of the ordinance itself, was, not to punish for an offense against the criminal justice of the country, but to provide a mere police regulation for the enforcement of good order and quiet within the limits of the corporation. So far as an offense has been committed against the public peace and morals, the corporate authorities have no power to inflict punishment, and we are not informed that they have attempted to arrogate it. It is altogether immaterial whether the state tribunal has interfered and exercised its powers in bringing the defendant before it to answer for the assault and battery; for whether he has there been punished or acquitted is alike unimportant. The offenses against the corporation and the state, we have seen, are distinguishable and wholly disconnected, and the prosecution at the suit of each proceeds upon a different hypothesis: the one contemplates the peace and good order of the city; the other has a more enlarged object in view, the maintenance of the peace and dignity of the state." That this view has been recognized and approved in this state may be seen by reference to *State ex rel. Burton v. Williams*, 11 S. C. 292, and the cases therein cited.

It seems to us, therefore, that the municipal court had jurisdiction, and could try the case against appellant, and that there was no error in refusing to dismiss the case on the ground that a prosecution in the court of sessions for the same act of selling had previously been commenced against appellant.

The judgment of this court is, that the judgment of the circuit court be reversed, on the ground of error in not allowing appellant a trial *de novo* before the city council, and that the case be remanded for trial according to the views herein announced.

MUNICIPAL CORPORATIONS—JUDICIAL NOTICE.—Municipal ordinances will not be judicially noticed except by the courts of the municipality itself; *Note to Lanfear v. Mestier*, 89 Am. Dec. 668, 669.

JUDICIAL NOTICE.—Courts do not take judicial notice of statutes of other states: *Atchison etc. R. R. Co. v. Betts*, 10 Col. 431. But judicial notice will be taken of the fact that the end of the calendar year is not the season for gathering crops: *Brown v. Anderson*, 77 Cal. 236; that merchantable products, such as potatoes, etc., have some value: *McKay v. Musgrove*, 15 Or. 162; that the Sipsey River, in Alabama, is above tide-water, and non-navigable: *Olive v. State*, 86 Ala. 88; of the location of Fort Scott, a city in Kansas, and

of the boundaries of Bourbon County, and that a place two miles away from Fort Scott is within the same county: *Kansas City etc. R. R. Co. v. Burge*, 40 Kan. 736; of public statutes of private or local application, but not of private or local statutes: *City of Covington v. Hoadley*, 83 Ky. 444.

RETROSPECTIVE LAWS REGULATING MATTERS OF PROCEDURE merely are not necessarily invalid on the ground of being *ex post facto*: Note to *Goshen v. Stonington*, 10 Am. Dec. 139, 140; *Maguiar v. Henry*, 84 Ky. 1; 4 Am. St. Rep. 182, and note 187, 188; *Connecticut Mut. L. Ins. Co. v. Talbot*, 113 Ind. 373; 3 Am. St. Rep. 655, and note. An ordinance passed subsequently to the issuance of a license to a liquor-dealer imposing a penalty of a fine against its violation by any person who shall keep open his saloon after a certain hour at night, is not invalid as being retroactive or *ex post facto*, unless the act sought to be punished was committed antecedent to its passage: *State v. Isabel*, 40 La. Ann. 340. The legislature has the power, by a general law retroactive in its operation, to release privilege taxes due the state and counties thereof: *Demoville v. Davidson*, 87 Tenn. 214; compare *State v. McClellan*, 87 Id. 52.

STATUTE CONTAINING AN EMERGENCY CLAUSE, once passed by both houses, but vetoed by the governor, and afterwards passed over his veto, takes effect and is in force from the date of its passage, although it contains the words, "the same shall take effect and be in force from and after its approval by the governor," and the governor never in fact approves it: *Biggs v. McBride*, 17 Or. 640.

CANNON v. LOMAX.

[29 SOUTH CAROLINA, 369.]

CO-TENANCY. — TENANTS IN COMMON are not entitled to partition while holding the common property under an unexpired lease from their ancestor.

Eugene B. Gary and W. C. Benet, for the appellants.

Cason and Bonham, for the respondent.

MCGOWAN, J. Samuel R. Lomax died intestate in the year 1886 (the precise day is not stated), seised and possessed of a respectable estate, and among other things a plantation containing six hundred acres of land. His heirs at law were five children, viz., G. W. Lomax, J. J. Lomax, Augustus B. Lomax, Julia E. Lomax, and Josephine E. Cannon. Soon after the death of the intestate, Josephine E. Cannon and the other distributees commenced an action to partition the land against J. W. Lomax and J. J. Lomax, who answered, denying that the parties could have partition, upon the ground that the intestate, before his death, on December 23, 1885, entered into a written contract, whereby he conveyed to them, by way of lease, the aforesaid plantation, at a specified rent therein men-

tioned, for ten years, the term to commence on January 1, 1887, which was after the death of the said intestate; that they are now in possession of the land, and are ready to comply with their part of the contract by payment of rent, notwithstanding the death of the lessor.

The issues were referred to the master, J. C. Klugh, Esq. The plaintiffs interposed a verbal demurrer, that the answer did not state facts sufficient to constitute a defense, which was sustained by the master, who ruled "that the court will not suffer the lessees under a valid lease to be interfered with by the partition. It may be right enough for the defendants to set up their lease in this proceeding, in order that the courts may protect their rights under it, but I do not think it can bar the partition. I sustain the demurrer." Both parties excepted, and the matter being heard by the circuit judge, he held "that the defendants have the right to hold the land for the term of ten years as set forth in the lease, and no partition or sale shall affect such holding. Further ordered, that the cause be referred to the master under the original order of reference, with the right to plaintiffs to attack said lease if they desire to do so," etc.

From this decree the plaintiffs appeal to this court upon the grounds,—“1. Because the presiding judge erred in sustaining defendants’ exceptions, and in overruling the plaintiffs’; 2. Because the judge erred in ordering that the defendants have the right to hold the land described for the term of ten years, as set forth in their lease, and no partition or sale shall affect such holding; 3. Because the judge erred in ordering that the case be referred to the master under the original order of reference; 4. Because, as the plaintiffs and defendants were tenants in common, the lease held by the defendants could not have the effect of preventing partition, even though it might, under proper allegations, have given the defendants a greater interest in the land than the plaintiffs had; 5. Because the judge erred in failing to order partition of the lands, when it appeared from the allegations, which were not denied, that the plaintiffs and defendants were tenants in common, and that each was the owner in fee of one sixth part of the lands described.”

It is true that partition is a right much favored, upon the ground that it not only secures peace, but promotes industry and enterprise, that each should have his own. The mere difficulty of effecting it is not regarded as a sufficient reason for

refusing to grant it: *Steedman v. Weeks*, 2 Strob. Eq. 147; 49 Am. Dec. 660. But as we understand it, partition is the right to a severance when there is rightful unity not only of title but of possession. Unless the title of both parties is clear, equity cannot decree a partition: *Wilkin v. Wilkin*, 1 Johns. Ch. 117; *Garrett v. White*, 3 Ired. Eq. 131; *Ramsay v. Bell*, 3 Id. 209; 42 Am. Dec. 162; and authorities in note to section 650, 1 Story's Eq. Jur.

Have the heirs at law of the intestate who are seeking partition such title now as to authorize them to demand instant partition? The effect of the demurrer, so far as concerns the present issue, was to admit the existence of the alleged lease, which, as we suppose, gave possession and exclusive rights for ten years, necessarily inconsistent with present partition. "A lease is, in effect, a conveyance or grant of the property, to last during the life of a person or for a term of years, or other fixed period, or at will, and generally with the reservation of a rent. . . . If the intention of the parties is that the grantee is not to be entitled to exclusive possession of the property, the grant is a license, and not a lease": 1 Rapalje's and Lawrence's Law Dict., tit. Lease. During the ten years, the heirs other than the lessees cannot be said to have title, except subject to the lease. They are bound by the act of their ancestor. They are certainly, in a sense, "tenants in common," and will at the end of ten years be entitled to partition; while, however, the lease stands unexpired, it seems to us that the action is premature.

"But where the title is denied, the court will generally require it to be first established, and will retain the bill to await the decision. Application for partition being premature, it was refused. But the bill was retained, with leave to apply by petition when the parties respectively became entitled to their shares": *Cole v. Creyon*, 1 Hill's Ch. 311; 26 Am. Dec. 208. This is, of course, on the assumption that the alleged lease is a good and valid instrument or conveyance. There is no copy of the paper in the brief, and we really know nothing as to its form, consideration, or the amount of rent secured, in which all the children have an interest. We agree with the circuit judge that the plaintiffs may, if so advised, assail the alleged lease, and if it should turn out to be testamentary in character, and as such void for the want of necessary formalities, or for want of consideration, or for undue influence, or

other cause, then, as a matter of course, the right of partition would immediately attach.

The judgment of this court is, that the judgment of the circuit court be affirmed.

PARTITION — WHO MAY COMPEL PARTITION: See extended note to *Nichols v. Nichols*, 67 Am. Dec. 703-712; *Johnson v. Johnson*, 7 Allen, 196; 83 Am. Dec. 676; *Baldwin v. Aldrich*, 34 Vt. 526; 80 Am. Dec. 695; *Phelps v. Palmer*, 15 Gray, 499; 77 Am. Dec. 378. Under the Tennessee statute, estates in remainder or reversion are subject to partition: *Bierce v. James*, 87 Tenn. 563. Where there is a dispute as to the title, there can generally be no partition; but where a chancery court has acquired jurisdiction upon other grounds, it may retain the case for the purpose of partition: *Hankins v. Layne*, 48 Ark. 544.

BATES AND COMPANY v. COBB.

[29 SOUTH CAROLINA, 395.]

FRAUDULENT CONVEYANCES. — A purchase of land by one in trust for another by a party not indebted at the time is void as to subsequent creditors of the purchaser without notice, when the intent is to secure the property against future ventures, and where the deed is not recorded, and the purchaser retains possession, leases the premises, uses the rent as his own without objection, and returns the land for taxation in his own name.

FRAUDULENT CONVEYANCES. — **DEED OF LAND TO ONE IN TRUST**, if left unrecorded, is void as to subsequent creditors of the purchaser without notice, and who trusted him on the faith of his ownership.

REMEDY. — **RETURN OF NULLA BONA** on a judgment against one of two or more partners for partnership debts is sufficient evidence of inability to secure payment as to him, and authorizes a resort to equity to reach property fraudulently disposed of by him. The other partners need not first be proceeded against at law.

Graydon and Graydon, and J. T. Johnson, for the appellants.

Benet and Cason, and De Bruhl and Bradley, for the respondents.

MCGOWAN, J. The plaintiffs severally recovered judgments against the defendant C. A. Cobb at the June term of the court at Abbeville (1886), the first-named for \$426, on a debt contracted in September, 1884, by Cobb and Richey, the senior member being C. A. Cobb; and the latter (Bieman) for \$205.05, on a debt contracted in November, 1885, by Cobb and McHugh, the senior member of this firm also being the said C. A. Cobb. Executions were issued and returned by the sheriff *nulla bona*.

This action was then brought by the judgment creditors to

set aside and have declared void as against his creditors a deed of gift of a certain storehouse and lot in the town of Greenwood, claimed to have been made by the said C. A. Cobb to his sister, Emma T. Cobb (now Turner), on August 11, 1883. The complaint alleged that the said Cobb purchased the said house and lot from Dr. Maxwell, paid for the same with his own money, and had the titles made to himself "for Emma T. Cobb," with intent to hinder, delay, and defraud the plaintiffs in the collection of their debts; that the deed was never recorded, but that the said C. A. Cobb held the property out to the world as his own, returned it for taxation in his own name, and used it in all respects as his own, and received credit on the faith of the property; and prayed that the storehouse and lot be adjudged to be the property of the defendant Cobb, and subject to the payment of his debts; and that the declaration in favor of the defendant, Emma T. Turner, be declared void as to the creditors of the said Charles A. Cobb, and for general relief. The defendants pleaded a general denial as to the alleged fraud in the declaration in favor of the sister, Emma T. Cobb.

It appeared that Dr. John C. Maxwell had previously given a mortgage of the house and lot to Professor Judson, treasurer of Furman University, to secure a debt; that Maxwell, the mortgagor, negotiated a sale of it for two thousand five hundred dollars to C. A. Cobb, who paid the mortgage debt and a balance to Dr. Maxwell, who, by the direction of Cobb, made a conveyance "to C. A. Cobb for Miss Emma T. Cobb." There was on the mortgage a receipt for the money, and an indorsement by Treasurer Judson, purporting to assign it to C. A. Cobb "for Miss Emma T. Cobb." There was testimony as to the relations between C. A. Cobb and his sister, and as to their conduct in regard to the house and lot. The master found as follows: "It is admitted that the money paid by C. A. Cobb was his own funds. The deed was never recorded. Charles A. Cobb has had control and management of the property so conveyed, has rented it, and collected the rents, receipting for the same, and has paid over small portions of the rent to his sister, retaining the balance for his own use, and has returned the property for taxation in his own name. About the time the foregoing deed was executed, and for some two years afterwards, C. A. Cobb was in business at Hodges, in this county, as a member of the two firms of Cobb and Richey, and Cobb and McHugh, and the testimony is, that

credit was extended to him on the strength of his reputed ownership of said property. . . . I do not think that there can be any question of plaintiffs' right to have their claims satisfied out of this property, . . . and find, as matter of fact, that said deed has never been recorded; that the property has been used and represented publicly by C. A. Cobb as his own; and that creditors have been led by such representations and by the public records to believe that said property was the property of C. A. Cobb, and on the strength of such belief, have extended him credit," etc.

Upon exceptions to this report, the cause came on to be heard by Judge Norton, who declared that he was satisfied with the findings of fact by the master, and held substantially that, from the evidence, there never was a *bona fide* irrevocable gift of the house and lot to the sister, but that from the beginning the alleged gift was merely pretensive and fraudulent, to be set up or not, as circumstances might require. The judge said: "I conclude that the intention of Charles A. Cobb, at the time the deed was made by Dr. Maxwell to him 'for Mrs. Emma T. Turner' (*née* Cobb), was to quietly, and as secretly as possible, put the property in her hands, to be returned to him if the business and sporting ventures upon which he was about to enter should prove successful; but if these ventures should prove unsuccessful, then to be held by her against the claims of such creditors as might exist at the collapse thereof; and that in either event, and pending the result, he should have the management and benefit of the property, and that Mrs. Turner (then Miss Cobb) was cognizant of, and fully concurred in, such intention. All their acts are consistent with this conclusion, and many of them are inconsistent with any other. Cobb says he was a sporting man, and might lose the property, evincing the idea of providing for future contingencies," etc. Thus holding, he granted the relief prayed for by the plaintiffs, and declared the lot subject to the payment of C. A. Cobb's debts, and the defendants appeal to this court.

The exceptions are numerous (twenty-three in number), and being printed in the brief, need not be set out here. As stated at the bar, we think they may be condensed into the following propositions: 1. That subsequent creditors cannot attack a deed for fraud, or ask that it be set aside as to them; 2. That there was no proof of fraud originally on the part of C. A. Cobb or Mrs. Turner, and, in that respect, the circuit

judge erred; 3. That C. A. Cobb did not hold out the property as his own, and did not receive credit on the faith of it; 4. That the plaintiffs have not exhausted their remedy at law.

It is certainly settled that a voluntary conveyance by a debtor is void as against his subsisting creditors, upon the principle that a man must be just before he is generous. But it by no means follows that all voluntary conveyances are good as against subsequent creditors. It is not quite certain that, in this case, there were no existing creditors of C. A. Cobb at the time the deed in question was executed by him, or had it executed by Dr. Maxwell. The judge states "that the debts which Richey says Cobb owed when goods were being bought for Cobb and Richey may have existed prior to the deed, and might have been the dregs of some previous mercantile business." But passing that, and assuming that Cobb was not indebted to any considerable extent at the time of the execution of the alleged deed of gift (1888), how does the matter stand? The principle applicable in such cases is carefully stated by the chief justice in the case of *Walker v. Bollman*, 22 S. C. 512: "Before a subsequent creditor can attack a settlement or transfer of a party made when not indebted, he must show that the same was voluntary, and was made with reference to future indebtedness, or prove circumstances of fraud other than what arises from its being voluntary," etc.

Apply this test. There is no doubt that the declaration here was voluntary; and his honor, the presiding judge, found that there were circumstances connected with the deed and the conduct of the parties which showed clearly that the deed was never intended to be a *bona fide* irrevocable transfer of the property to the sister, but from the beginning was pretensive, and merely intended to cover and secure the property in any event that might happen. Is that finding contrary to the manifest weight of the testimony? If not, this court, under the authority of many decisions, must let it stand. We have examined the testimony carefully, and, without undertaking to restate it, we must say it seems to us that the weight of the testimony is not against the finding so as to authorize us to reverse it. But, on the contrary, there is evidence, afforded by a number of circumstances, to sustain it. "The intent may be collected from the circumstances of the case, and such badges of fraud as the transaction wears. Some of the usual badges are the omission to record the conveyance, possession of the property and obtaining false credit thereby, . . . the

magnitude of the conveyance compared with the grantor's means, the concealment or notoriety of the transfer, the immediate engagement in a hazardous business, and the contracting of debts immediately after the transfer," etc.: Bump on Fraudulent Conveyances, 309; and see *Iley v. Niswanger*, 1 McCord Ch. 523.

But if, by possibility, this may be a mistake, there can be no doubt whatever of the following facts found by the master and concurred in by the judge: that the deed was withheld from the registry; that notwithstanding the words in the deed, "for Miss Emma T. Cobb," C. A. Cobb retained the possession, leased the premises, and used the rent as his own, without objection on the part of his sister, the alleged donee, who testified that she "allowed Charley to use it as his own, so he did not run any risk with it"; Cobb mortgaged the lot in his own name, returned it for taxation in his own name. The only record which could have shown Mrs. Turner's interest was withheld from public inspection, and every act touching the property after it passed from Dr. Maxwell's ownership, from which creditors and the public could draw inferences as to the ownership, was, whether intentionally or not, calculated to induce the belief that it was C. A. Cobb's property. The testimony shows that creditors were led to so believe, and on that belief, extended him credit.

In the case of *Brock v. Bowman*, Rich. Eq. Cas. 189, Judge O'Neill, in delivering the judgment of the court, said: "If a debtor gives away property, and still retains the actual possession, the creditor has the right to suppose that all the property in his possession is liable to his debts, and therefore his rights cannot be affected by a gift, of which he is not bound to take notice. As to gifts consummated by the transfer of actual possession, subsequent creditors cannot, of course, complain; for they do not trust the debtor on the faith of property not in his possession. But if, after having made a gift, the donor retains possession, it is, as to subsequent creditors without actual or constructive notice (by recording, when done in conformity to law), absolutely void: *Cordery v. Zealy*, 2 Bail. 205. For they are legally presumed to give credit on the faith of the property in their debtor's possession. These legal rules and their exceptions I have stated with more than ordinary care, so that the complaint may not be again made that the law is unsettled. They are rules to which all decisions must conform as settled law," etc.

It is said, however, that this was in reference to personal property, as to which possession is *prima facie* evidence of ownership, but that such is not the case as to land. It may be true that the mere possession of land is not generally as strong evidence of ownership as that of personalty; but that is for the reason that, so far as the public is concerned, the real ownership of land is assumed to be shown by the record, required by law to be made for the express purpose of giving notice to all concerned. Where there is the possession and use of land as owner, — so held out to the world, — and there is no registry which explains the fact, we are unable to see why the same principle should not apply. The rule is based on the abhorrence of the law for covert and fraudulent dealing, which may as well occur in reference to one kind of property as another: See Bump on Fraudulent Conveyances, 48.

The conveyance of Dr. Maxwell to C. A. Cobb was for valuable consideration, and as to the creditors of Cobb, must stand. But the superadded supplemental words, "for Miss Emma T. Cobb," must be considered as an attempt on his part to make a separate and distinct deed of gift to her. The view is, that this effort to cover the property was kept secret and never recorded, and therefore, as to subsequent creditors without notice, who trusted him on the faith of his ownership, is void. "If a conveyance is merely colorable, and a secret trust and confidence exist for the benefit of the grantor, it is void not only against precedent but subsequent creditors, for it is in such a case a continuing fraud, and may actually operate as such as well in reference to debts contracted after as before the conveyance. Property conveyed in trust is still the property of the grantor for every beneficial purpose, and the secret trust in a conveyance tainted with actual fraud renders the property liable to subsequent creditors. . . . The purpose or effect of a conveyance must, in general, be to injure subsequent creditors, in order to render it void as to them. The question is generally one of fact. A conveyance can only be valid as to them when they are not intended or liable to be delayed, hindered, or defrauded by it. If the creditor had notice of the conveyance at the time the debt was contracted, the conveyance will be valid as to him. When a transfer is rendered fraudulent by the retention of possession, it is also void as to them, for they are deceived by the false appearance of wealth, and thereby induced to give the vendor credit": Bump on Fraudulent Conveyances, 320, and many authorities in notes.

We do not think that it was error to set aside, as against the creditors of C. A. Cobb, so much of the unrecorded deed from Dr. J. C. Maxwell as purports to convey the lot "for Miss Emma T. Cobb," leaving the title in C. A. Cobb, and liable for his debts.

As to the allegation of error in setting aside the mortgage, which was, in fact, satisfied. Upon this mortgage treasurer Judson signed the following indorsement: "Received of C. A. Cobb, for Miss Emma T. Cobb, \$2,460, on note of J. C. Maxwell, for the security of which the mortgage was given; and I do hereby assign to C. A. Cobb, for Miss Emma T. Cobb, the mortgage to better protect his title to said property conveyed to him by J. C. Maxwell." If the assignment, as stated, was intended to protect the rights of C. A. Cobb, we do not see how it could so operate; for Dr. Maxwell had paid the note it was given to secure, and executed titles to C. A. Cobb "for Miss Emma T. Cobb." If it was intended to protect Miss Cobb under the provision of the deed "for Miss Emma T. Cobb," we have already endeavored to show that said provision was fraudulent and void as against the creditors without notice of C. A. Cobb; and in this view we concur with the circuit judge, that the assignment of the mortgage must follow the provision in the deed "for Miss Emma T. Cobb."

As to the necessity for the plaintiffs to exhaust their legal remedy before bringing action, we need only say that the judgments were against C. A. Cobb alone, and had been returned *nulla bona* by the sheriff, which is regarded the appropriate and necessary evidence of inability to secure payment otherwise: *Suber v. Chandler*, 18 S. C. 526.

The judgment of this court is, that the judgment of the circuit court be affirmed.

FRAUDULENT CONVEYANCES. — A conveyance without consideration upon a secret trust, or upon a reservation for the benefit of the grantor, or to some person without interest therein, is capable of being set aside, no matter what the grantor's intent may have been: *Lyons v. Leaky*, 15 Or. 8; 3 Am. St. Rep. 133; *Weber v. Rothchild*, 15 Or. 385; 3 Am. St. Rep. 162; *Mackason's Appeal*, 42 Pa. St. 350; 82 Am. Dec. 517, and note; *Winkley v. Hill*, 9 N. H. 31; 31 Am. Dec. 215; *McCulloch v. Hutchinson*, 7 Watta, 434; 32 Am. Dec. 776. But an agreement by the grantee to support the father and mother of his grantor during their natural lives is not such a secret trust as will invalidate a deed of conveyance: *Scott v. Davis*, 117 Ind. 232. Possession of goods retained by a vendor is evidence of a secret trust reserved in his favor where there has been a sale to his brother, which sale was not made known or published until the goods were attached as the property of the vendor: *Valley Distilling Co. v. Atkins*, 50 Ark. 239.

ESTOPPEL. — Where one by words, acts, or even silence, when he ought to speak, induces another to believe the existence of a certain state of facts, and to act upon that belief to alter his condition, the former will be estopped from alleging to the contrary to the detriment of the latter: *Caldwell v. Auger*, 4 Minn. 217; 77 Am. Dec. 515; *Drew v. Kimball*, 43 N. H. 282; 80 Am. Dec. 163; *Musselman v. McElhenny*, 23 Ind. 4; 85 Am. Dec. 445; *Choteau v. Goddin*, 39 Mo. 229; 90 Am. Dec. 462; *Davis v. Davis*, 26 Cal. 23; 85 Am. Dec. 157; *Simpson v. Pearson*, 31 Ind. 1; 99 Am. Dec. 577; *Cook v. Walling*, 117 Ind. 9; 10 Am. St. Rep. 17, and note 22, 23; *Reid v. Ladue*, 66 Mich. 22; 11 Am. St. Rep. 462, and note 466.

EX PARTE DICKINSON.

[29 SOUTH CAROLINA, 458.]

CONFLICT OF LAWS. — ASSIGNMENT FOR THE BENEFIT OF CREDITORS by a citizen of New York, made in that state, and giving a preference to certain creditors, though valid there, is void in South Carolina, where the statute prohibits the giving of such preference, and will not be enforced in the latter state in favor of citizens of New York as against property of the assignor situated in South Carolina, but such citizens may, by attachment, secure a lien against such property.

CONFLICT OF LAWS. — TRANSFER OR ASSIGNMENT of personal property located in South Carolina, made by the owner in accordance with the law of his domicile in another state, will not be recognised in South Carolina when in direct conflict with the laws of that state.

ASSIGNMENT FOR BENEFIT OF CREDITORS. — The South Carolina act relating to assignments for the benefit of creditors applies as well to assignments made outside the state as to those made within it.

PLEADING AND PRACTICE. — RESPONDENT SHOULD NOTIFY APPELLANT of any additional grounds upon which he intends to rely in support of the judgment below.

ATTACHMENT — NON-RESIDENT. — A citizen of another state has the same rights as a citizen of this state, under the attachment law of South Carolina.

Ira B. Jones, for the appellant.

Wylie and Wylie, for the respondent.

McIVER, J. On the fifteenth day of October, 1886, the defendant, Blauvelt, a citizen of the state of New York, executed a general assignment to the petitioner, Dickinson, for the benefit of his creditors, which was duly recorded in the county of Lancaster on the 23d of October, 1886. This assignment was executed in the state of New York, and provided for the payment of all wages and salaries actually owing to the employees of the assignor in preference of all other debts, which preference is not only allowed but required by the statutes of New York. At the time of the execution of the assignment, the

principal part of the assignor's property was in the state of New York, though he also owned some property in South Carolina, located in the counties of Lancaster and Kershaw. Between the 27th of October and the 10th of November, 1886, the plaintiffs, appellants, three of whom are citizens and residents of the state of New York, and the other two of the state of Connecticut, as creditors of Blauvelt, commenced their actions against him in this state, and procured the issue of warrants of attachment, which were levied on a tract of land in the county of Lancaster, known as the Gay mine, and also upon one cotton-gin, one portable steam-engine, one saw-frame and fixtures, and one log-carriage and fixtures found on said land; and also upon a tract of land in Kershaw County, known as the De Kalb factory, including all of Blauvelt's interest in mill, gin, fixtures, etc.

On the fifteenth day of February, 1887, the said Asa D. Dickinson filed his petitions as above stated, claiming to be the owner of the property in Lancaster County levied on under the attachments, under and by virtue of the deed of assignment above stated, and praying that the same might be adjudged to him, and that "said warrants of attachment be dissolved." On hearing these petitions with the answers thereto, Judge Pressley ordered an issue in each case to determine the question of title. These issues came on for trial before Judge Wallace, who, by consent, heard the same without a jury, and rendered judgment, holding that the cotton-gin was a fixture, and must therefore be regarded as part of the realty; but that the engine and saw-mill were not fixtures, and must be regarded as personal property, and that Blauvelt had no leviabie interest in any of the property, the same having passed to his assignee under the deed of assignment before the levy of the attachments, and therefore ordered that the attachments be set aside, and the levies under them be vacated.

From this judgment the attaching creditors appeal upon the several grounds set out in the record, assigning errors, which may be stated in general terms as follows: 1. In holding that the engine and saw-mill were not fixtures, and should therefore be regarded as personal property; 2. In holding that the deed of assignment, though providing for a preference which would render it void under the law of this state, was valid under the law of the state of New York, and upon principles of comity should be held valid here, in a case like this,

where none of the parties interested are citizens of this state invoking the protection of our law.

No question as to the propriety of this mode of proceeding, or as to the right of a person not a party to the proceedings in attachment to move to set it aside, was made either in the court below or in the argument here, and we therefore decide nothing as to that. It may be that the fact that in these cases issues were ordered to try the title to the property levied on under the attachments would be sufficient to distinguish these cases from *Copeland v. Piedmont etc. Ins. Co.*, 17 S. C. 116, and *Metts v. Piedmont etc. Ins. Co.*, 17 Id. 120, but as this matter was not discussed or even referred to, either in the court below or in the argument here, we will pass it by without any intimation of opinion either one way or the other.

The fundamental question in these cases is as to the validity of the assignment under which the petitioner claims,—whether it is sufficient to pass the title to the property found in this state, and under the jurisdiction of its courts. It is conceded that if this assignment had been executed here, it would have been absolutely void under the provisions of section 2014 of the General Statutes, because of the preferences provided for therein; but it is contended that inasmuch as the assignment was valid under the laws of New York, where it was executed, it must be so regarded here upon principles of comity, especially where the interests of our own citizens are not involved. Upon this question there is no little conflict of authority elsewhere, but we have no decision, so far as we are informed, in this state upon the subject. The cases of *West v. Tupper*, 1 Bail. 193, *Greene v. Mowry*, 2 Id. 163, *Mitchell v. Smith*, 3 Strob. 236, and *Russell v. Tunno*, 11 Rich. 303, do decide that a valid assignment executed abroad will take precedence over the liens of subsequent attachments taken out in this state and levied upon property here; but none of the assignments under consideration in those cases contained provisions which, under the express statute law of this state, would render them void. The question, therefore, which we are now called upon to decide is an open one in this state.

It seems to us that, upon general principles, the assignment here in question cannot be recognized. The legislature having seen fit to declare, in the most positive and unqualified terms, that “any assignment by an insolvent debtor of his or her property for the benefit of his or her creditors, in which any preference or priority is given to any creditor or creditors”

the said debtor by the terms of the said assignment, over any other creditor or creditors [with certain exceptions not applicable to the present case], such assignment shall be absolutely null and void, and of no effect whatever," we do not see by what authority a court, called upon to administer the laws of this state, could undertake to declare that an assignment providing for such preferences was good and valid, and give it just as full force and effect as if the legislature had made no such declaration. Surely the courts of this state cannot treat that as valid which the legislature has expressly declared shall be absolutely null and void.

The general rule undoubtedly is, that in regard to all contracts of which the subject-matter is personal property, their validity is to be tested by the law of the place where the contract is made. If valid there, they will be sustained everywhere, upon principles of international or interstate comity: See Story's Conflict of Laws, c. 9; Burrill on Assignments, sec. 302. But to this rule there is a well-defined exception, that where the contract is in violation of established public policy of the state whose courts are called upon to enforce the contract, especially if it is in violation of some express statutory enactment of such state, this rule of comity is no longer recognized or acted upon, and in such case the contract, though valid where made, cannot be enforced in the state in violation of whose laws it was made; for, as is said by Mr. Justice Davis, in *Green v. Van Buskirk*, 7 Wall. 151: "This principle of comity always yields when the laws and policy of the state where the property is located have prescribed a different rule of transfer from that of the state where the owner lives." This doctrine was subsequently recognized and affirmed in the case of *Hewer v. R. I. Locomotive Works*, 93 U. S. 664.

It may be that the language used in those cases is too broad, as perhaps authorizing the inference that no transfer of personal property, made by the owner in accordance with the laws of the state where he has his domicile, will be recognized in another state, unless it is made in the manner prescribed by the laws of the latter state, but such was not the point decided in either of those cases. The real point decided was, that a transfer of personal property located in one state, by the owner in the state of his domicile, valid according to the laws of that state, but in violation of the laws of the state where the property was actually located, could not be recognized by the

courts of the latter state, and that is the extent to which we go. While, as we have said, there is some conflict of authority upon this subject, our view is sustained by the decisions of courts entitled to high consideration: See *Warner v. Jaffray*, 96 N. Y. 248; 48 Am. Rep. 616; *Pierce v. O'Brien*, 129 Mass. 314; 37 Am. Rep. 360; *Paine v. Lester*, 44 Conn. 196; 26 Am. Rep. 442; *Moore v. Church*, 70 Iowa, 208; 59 Am. Rep. 439; *Stricker v. Tinkham*, 35 Ga. 177; 89 Am. Dec. 280; *Mason v. Stricker*, 37 Ga. 262; besides the two cases above cited from the supreme court of the United States.

An examination of the cases which have been and may be cited to sustain a contrary view will show that some of them (as, for example, *Butler v. Wendell*, 57 Mich. 62; 58 Am. Rep. 329) rest upon the theory that the provisions of the assignment act of that state forbidding preferences applies only to assignments made within that state, while others draw a distinction between the rights of resident and non-resident attaching creditors, recognizing the priority of a resident attaching creditor over an assignment valid by the law of the state where it was executed, but invalid by the law of the state where it is sought to be enforced, but denying such priority to a non-resident attaching creditor. Such a distinction we are not inclined to recognize; but, on the contrary, prefer to adopt the language of Danforth, J., in *Hibernia National Bank v. Lacombe*, 84 N. Y. 367; 38 Am. Rep. 518: "The plaintiff, as we have seen, although a foreign creditor, is rightfully in our courts pursuing a remedy given by our statutes. It may enforce the remedy to the same extent and in the same manner and with the same priority as a citizen. . . . Once properly in court and accepted as a suitor, neither the law nor the court administering the law will admit any distinction between the citizen of its own state and that of another. Before the law and in its tribunals there can be no preference of one over the other."

The true rule, as we understand it, is, that while on principles of comity the transfer or assignment of personal property located here, made by the owner in accordance with the laws of his domicile, will be recognized here, yet, in the language of Colt, J., in *Pierce v. O'Brien*, *supra*, "there is no comity which requires us to give force to laws of another state which directly conflict with the laws of our own." Indeed, some of the cases cited by respondent, as, for example, *Weider v. Mad-dox*, 66 Tex. 372, 59 Am. Rep. 617, concede that an assign-

ment of personal property for the benefit of creditors, made in accordance with the laws of the debtor's domicile, is good in the state where the property is actually located only in the absence of express enactment of such state to the contrary. Hence, where, as in this case, it is sought to set up an assignment directly in conflict with our express statutory enactment, and containing provisions which our statute declares shall render it "absolutely null and void and of no effect whatsoever," we think it clear that no principles of comity require us to recognize such an assignment, even though it be in strict conformity with the law of the debtor's domicile.

It is, however, earnestly insisted by respondent that our statute relates only to domestic assignments, — those executed within the limits of this state; and that its provisions do not apply to foreign assignments, — those executed outside the limits of this state; and the case of *Russell v. Tunno, supra*, is relied on to support this view. It will be observed, however, that Judge Withers in that case was considering the assignment act of 1828, which relates solely to the administration of assignments, and contains no provision touching their validity. After giving a brief abstract of the provisions of the act, he says: "It seems to us manifestly to contemplate, not the validity of assignments, but the administration of them, a regulation in restraint of assignee as well as agent; and a priority of right among creditors prescribed in an assignment cannot depend upon legislation having such purview only. It nowhere discloses that a non-compliance with any or all of its provisions shall render the assignment itself null and void, in whole or in part, whether such default proceed from agent, assignee, or creditors, some or all." It was, therefore, very properly held in that case that the assignment act of 1828 applied only to domestic assignments.

But the assignment act of 1882 (sections 2014, 2015, and 2016 of the General Statutes) contains very different provisions from those found in the act of 1828. It does not stop with simply regulating the administration of assignments, but it goes on to declare that if any assignment shall contain certain provisions, it will thereby be rendered absolutely null and void, and hence the remarks of Judge Withers, above quoted, cannot properly be applied to such an act. Indeed, the language which he uses, and the reasons which he gives for limiting the operation of the act of 1828 to domestic assignments, afford the strongest inference that he would have placed a

different construction upon the present act, which is manifestly not confined to the mere administration of assignments, but does in express terms relate to their validity also. That case, therefore, affords no support whatever to the view that the present assignment act relates only to domestic assignments; and to place such a construction upon the act would require us to interpolate words into the act, which we have no authority to do. The language of the act is, "any assignments," etc., and to adopt the construction contended for by respondent, it would be necessary for us to interpolate some such words as are found in the Missouri statute, "hereafter made in this state," or some equivalent words; and this we have no right to do.

We are unable to discover any more reason why the words "any assignment," as used in section 2014, should be confined to assignments executed within this state, than that the words "every agreement," as used in section 2022 of the General Statutes, should be confined to agreements entered into in this state, and yet the provisions of that section were applied to an agreement entered into outside the limits of the state in the case of *Ludden etc. Music House v. Dusenbury*, 27 S. C. 464, and no question was ever even suggested, so far as we know, as to the propriety of such application. There is not a word in either section indicating an intention on the part of the legislature to limit the operation of either of those sections to papers executed in this state; and in the absence of any such indication it is the plain duty of the court to give the words used their natural and ordinary signification. The manifest object of both of these provisions was to prevent fraud, and surely the courts of this state cannot be expected to give force and effect to that which the legislature has practically declared to be a fraud, or to hold that an act, if done by a citizen of this state, is a fraud, but if done by a citizen of another state, is perfectly legal and valid.

The circuit judge seems to have been impressed with the view that, inasmuch as the deed of assignment was executed in accordance with the laws of this state, so far as signing, sealing, and delivery in the presence of two witnesses were concerned, and that the only conflict with our law was in one of the trusts of the deed, that would not invalidate the assignment here, as the trusts were to be executed in New York, and not here. There would be great force in this view if our statute, like those of some of the states, simply declared the pref-

erence void, and required the property to be distributed *pro rata* amongst all of the creditors, without regard to any preferences provided for in the deed; for such an act would affect only the administration of the trust, and that might well be left to be governed by the law of the place where the trusts were to be executed. But our act goes much deeper, and declares that the assignment itself, containing such a provision, shall be absolutely null and void. It strikes not merely at the preferences provided for, but at the whole assignment, and therefore we cannot adopt the view taken by the circuit judge.

The respondent has, in his argument here, for the first time raised the question whether the appellants, who are not residents of this state, and whose causes of action arose elsewhere, are entitled to the remedy afforded by our attachment laws. This question, not having been passed upon or even raised in the circuit court, so far as we can discover from the case, is not, strictly speaking, properly before us. But inasmuch as the rule is that a judgment appealed from may be affirmed upon other grounds than those upon which it was rested by the circuit court, we will not decline to consider the question, though according to proper practice the respondent should have given notice to appellants that he intended to support the judgment below upon the ground that the attaching creditors had no right to the remedy afforded by our attachment laws, and therefore, irrespective of the assignment, the attachments could not bind the property.

There can be no doubt that a non-resident may maintain an ordinary action upon a money demand in the courts of this state, without regard to the place where the cause of action arose; and as an attachment is nothing more than a remedy in aid of an ordinary action, we see no reason why such non-resident may not invoke such remedy just as well as a citizen of this state, unless there is something in the provisions of our attachment law which confines the benefits afforded by it to citizens or residents of this state. But we do not find any such limitation in our attachment act, and on the contrary, its provisions seem to be broad enough to cover any one who may be entitled to institute an action in the courts of this state.

Under the view which we have taken, the question whether certain of the property attached can be regarded as fixtures will not arise, and has not therefore been considered. Ac-

According to our view, the assignment under which the petitioner claims is, under the express terms of our statute, absolutely null and void, and cannot have any force or effect whatsoever either to transfer real or personal property.

The judgment of this court is, that the judgment of the circuit court be reversed, and that the petitions in each of the cases above stated be dismissed.

CONFLICT OF LAWS — ASSIGNMENTS FOR THE BENEFIT OF CREDITORS. —

An assignment of property for the benefit of creditors executed in one state will not confer title to property in another state in contravention of the laws of the latter state: *Warner v. Jafray*, 96 N. Y. 248; 48 Am. Rep. 616; *Pierce v. O'Brien*, 129 Mass. 314; 37 Am. Rep. 360; *Paine v. Lester*, 44 Conn. 196; 26 Am. Rep. 442; *Moore v. Church*, 70 Iowa, 208; 59 Am. Rep. 439; *Stricker v. Tinkham*, 35 Ga. 176; 60 Am. Dec. 280, and note; *Kelly v. Orapo*, 45 N. Y. 86; 6 Am. Rep. 35; *Hanford v. Paine*, 32 Vt. 442; 78 Am. Dec. 586, and note 594-597; *Walters v. Whitlock*, 9 Fla. 86; 76 Am. Dec. 607; *Bryan v. Brislin*, 26 Mo. 423; 72 Am. Dec. 219; *McClure v. Campbell*, 71 Wis. 350; 5 Am. St. Rep. 220, and note; *Loving v. Pairo*, 10 Iowa, 282; 77 Am. Dec. 106; *Southern Bank v. Wood*, 14 La. Ann. 554; 74 Am. Dec. 446; for one state is not bound by comity to give effect to laws of another state which are repugnant to the policy of its own laws: *McLean v. Hardin*, 3 Jones Eq. 294; 69 Am. Dec. 740; *Kanaga v. Taylor*, 7 Ohio St. 134; 70 Am. Dec. 62; *Roche v. Washington*, 19 Ind. 53; 81 Am. Dec. 376; *Smith v. McAtee*, 27 Md. 420; 92 Am. Dec. 641. But there are decisions holding that assignments for the benefit of creditors made in one state will pass title to property in another state: *Smith's Appeal*, 117 Pa. St. 30; *Coffin v. Kelling*, 63 Ky. 649; *Pemberton v. Klein*, 43 N. J. Eq. 96; *Bacon v. Horne*, 123 Pa. St. 452; compare *Harvey v. Edens*, 69 Tex. 420.

CASES
IN THE
SUPREME COURT
OF
TEXAS.

EAST LINE AND RED RIVER R. R. Co. v. SCOTT.

[72 TEXAS, 70.]

ATTORNEY BY VIRTUE OF HIS EMPLOYMENT HAS NOT AUTHORITY TO COMPROMISE an action which he is employed to prosecute or defend; but if such attorney assumes the right to exercise the power to compromise the action, and does exercise such power, it is not to be presumed that he acted in the matter without lawful authority, and slight evidence only may be sufficient to authorize the belief that he was clothed with all the power that he assumed to exercise.

CONSIDERATION SUFFICIENT TO SUPPORT CONTRACT FOR FUTURE EMPLOYMENT. — The compromise of a pending action whereby the plaintiff agrees to accept a money judgment in his favor for a less sum than the damages claimed by him in his petition, and a promise by the defendant to give him future employment in full satisfaction of his claim, constitute a sufficient consideration to support the contract for future employment. The absence of a promise by the plaintiff to serve in the future employment is a matter of no importance, except as it may bear on the question whether the contract was sufficiently certain.

CHARGE NOT APPLICABLE TO CASE MADE BY PLEADINGS OR PROOF is properly refused.

CONTRACT OF EMPLOYMENT WITH TERM OF SERVICE AT DISCRETION. — When in a contract of employment the term of service is left to the discretion of either party, or the term is left indefinite, or determinable by either party, then either party may put an end to it at will, and in such case it is no breach of contract to refuse to receive further services, and the refusal to accept any at all will entitle the employee to nominal damages only.

CONTRACT OF EMPLOYMENT FOR WHATEVER LENGTH OF TIME EMPLOYEE MAY DESIRE TO SERVE. — A contract whereby an employer, for a sufficient consideration, agrees to employ another for whatever length of time the latter may desire to serve, entitles the employee to fix the period of his service when he presents himself for work and demands employment, and he may recover damages for a breach of contract if he is

not furnished with employment for the time thus fixed. The original contract becomes certain when the term of service is so fixed, and is not within the statute of frauds.

PAROL EVIDENCE TO SHOW COMPROMISE AGREEMENT UPON WHICH JUDGMENT WAS ENTERED. — When a judgment entered upon an oral agreement for a compromise fails to embody the agreement or to recite that it was rendered in accordance with an agreement, parol evidence of such oral agreement is admissible in a suit to recover damages for a breach of the compromise contract.

ACTION to recover damages for a breach of contract. The opinion states the case.

F. H. Prendergast, for the appellant.

H. McKay and C. A. Culberson, for the appellee.

STAYTON, C. J. The general nature and result of this action is thus stated in the brief by counsel for appellant: "On November 10, 1886, W. F. Scott filed suit in the district court of Marion County, against appellant, alleging that he was injured by the appellant in 1882; that he filed suit for damages, which was compromised in 1884 by the railroad paying him four thousand five hundred dollars, and agreeing to employ Scott as engineer so long as he desired to be so employed; that they paid the four thousand five hundred dollars, but when Scott applied for employment on July 1, 1886, they refused to employ him. Defendants deny the agreement, and say if any such agreement was made with Campbell and Taylor, they had no authority to make it; that the agreement was void because not in writing and not to be performed in a year; the agreement was contrary to public policy, and was not incorporated in the judgment which contained the settlement in 1884, and was not mutually binding on both parties, and indefinite. January 14, 1888, judgment for two thousand four hundred dollars for plaintiff. Defendant appealed."

The petition alleges so much of the compromise agreement as affects the case before us, as follows: "It was further agreed that the said company thereafter, when this plaintiff should ask for and accept service and employment by the said company in the running and operating its said railroad, in the employment of locomotive-engineer, that this being and still is the trade, occupation, and profession of your petitioner, would employ petitioner for whatever length of time your petitioner might desire to retain such employment, and at the reasonable and customary pay and wages of such employee on railroads, which then was and still is from \$100 to \$150 per month;

which proposition of settlement and compromise your petitioner did then and there accept in full satisfaction and settlement of all his claim for damages.' "

The petition then alleges that appellee proposed, about July 1, 1886, to enter appellant's service as contemplated by the compromise agreement, but that appellant refused to receive his services or pay for them, and then proceeds as follows: "That the said services and the wages therefor are and would be worth to your petitioner the sum of, to wit, \$150 per month from the said first day of July, 1886, for a reasonable period of at about the next ten years; that plaintiff is now a man of about twenty-six years of age, and has reasonable expectation of living and exercising his said trade and profession for the next ten years, and so plaintiff says that he has been damaged by said company in the sum of, to wit, twenty thousand dollars. Wherefore," etc.

The evidence offered for appellee was sufficient to show, if uncontroverted, that E. W. Taylor, who may have been assistant secretary for the company, and Colonel Campbell, an attorney representing the company in the defense of that case, may have made an agreement, at the time of and as a part of the compromise, looking to the future employment of appellee.

The statement of appellee in regard to that is: "I finally told them I would take four thousand five hundred dollars if they would give me a job on the defendant's road,—that is, that they would give me the position of locomotive-engineer on the road, such as I had, for life. I told Colonel Campbell that I wanted it fixed up so that I could not be fired; meaning that they could not discharge me. He answered that he did not know so much about that. I told him he could fix it that way, and he finally said all right, let it go that way, and the contract as above stated was agreed upon."

Another witness who was present stated that the agreement was "that the road would pay four thousand five hundred dollars, and give plaintiff a position of engineer for life."

The testimony of appellee as to his application for employment is, that "about June 28, 1886, I applied to Col. E. W. Taylor for work on the road under the contract, and told him I was ready to go to work."

He then states that Taylor gave him a letter of recommendation to the company's master-mechanic, who referred him to a Mr. Clark, his superior in authority, whose business it was to employ engineers. In reference to his interview with

Clark, he states: "I then saw Clark about it, stating what I wanted and my case. He says to me: 'You had a suit against the company, didn't you?' I told him I did. He said: 'I have no place for you.' I then told him good morning, and left. . . . I would have taken the position of engineer for life, and I suppose I have an expectation of living perhaps ten years."

The appellant asked the court to instruct the jury, that "there being no proof before you that Campbell had any other authority than as the attorney for defendant, you are charged that an attorney would not have authority to make the contract sued on, merely because he was attorney; therefore, the contract made by Campbell cannot bind the company."

This charge was refused, and correctly so if there was any evidence tending to show with reasonable certainty that Campbell had authority to make the compromise. That he did agree to a compromise judgment, which the appellant recognized and satisfied, is rendered clear by the evidence before us. The jury might look to this, although it is not directly shown that he had authority to make that part of the agreement not contained in the judgment, as tending to show that he had authority to make a compromise. Colonel Campbell was not alive at the time of the trial, and his testimony seems not to have been taken.

While an attorney, by virtue of his employment, has not authority to make a compromise of an action he is employed to prosecute or defend, it is not to be presumed, when one so situated assumes the right to exercise such a power, and does exercise it, that this was done without lawful authority, and but slight evidence in such a case may be sufficient to authorize the belief that he was clothed with all the power he assumed to exercise.

That Colonel Campbell agreed to the compromise judgment is not controverted; his power to do that is not questioned, though the manner in which it was conferred is not shown. He reported the compromise judgment, and those who seem to have had general control of the litigation of the company found no fault with his action, but approved it for payment, and the company satisfied it.

The inference from the evidence is very strong that, in reference to the persons who were injured at the same time appellee was,—of whom there were many,—Colonel Camp-

bell may have been given all the power he assumed to exercise.

E. W. Taylor testified "that when plaintiff was injured on August 7, 1882, on the road, many others were also injured, and several were killed. Witness, as agent and interested party, had endeavored to settle and compromise the cases. Colonel Campbell represented the defendant in all the cases, —in the Scott, Harper, Rosser, Tetso, and other cases; and all of them, except those of Harper and Tetso, had been settled by Campbell and the witness. Witness and Campbell had also endeavored to compromise the Harper and Tetso cases for defendant, but without success."

In view of all these facts, we are of the opinion that there was evidence from which the jury might fairly find that Colonel Campbell had power to make the compromise, and although there was evidence tending to show to the contrary, it was not error to refuse the instruction asked.

Appellant asked a charge, which the court refused. That was: "There being no evidence nor pleadings before you that plaintiff was bound by the contract sued on, nor that he agreed to be bound by it, there was therefore a want of mutuality in the contract, and defendant is not bound by it."

Reciprocal promises made at the same time, and in relation to an agreement, furnish the one for the other a consideration to support a contract, and if the appellee was relying on such a consideration to sustain the contract, he would fail, for there is no pretense that he promised to render any services whatever for the appellant.

On the contrary, his petition shows that it was optional with himself whether he served the appellant.

The contract alleged, however, does not rest on such a consideration.

The asserted compromise of the pending action, whereby the appellee agreed to accept the judgment rendered, and the promise made in satisfaction of his claim for damages, was the consideration on which the contract may well stand.

The consideration was sufficient, and the absence of a promise by the appellee to serve is a matter of no importance, except as it may bear on the question whether the contract was sufficiently certain.

The promise alleged contained two propositions: 1. That appellant would employ appellee as a locomotive-engineer;

2. That for such services as he should render it would pay to him the compensation usual in such employment.

The promise to do these things being binding, had the appellee rendered services in accordance with the contract, he would have been entitled to receive compensation therefor under the contract, and not upon an implied contract.

That could be but the ordinary case of a promise by one person to pay to another money when he shall have performed some specified service, which when done the contract is held to be executed on one side, the consideration for the promise paid or given, and the contract complete.

The charge refused was not applicable to the case made by the pleadings or proof, and was, therefore, correctly refused.

The following charge was also asked: "The jury are charged that there is no pleading nor proof that the contract sued on was for service for any definite period of time, and no evidence that plaintiff ever offered to be bound to work for any definite period of time; then the contract is too indefinite, and plaintiff cannot recover."

This charge was refused. Whether the contract was sufficiently certain as to the period of time appellee should render services for appellant was also raised by the motion for new trial. The petition does not aver that appellant ever contracted to employ appellee for any definite period of time, but distinctly alleges that it did promise to give him employment "for whatever length of time which your petitioner might desire to retain such employment."

The petition also alleges that appellee, "about the first day of July, 1886, offered to said company for employment, he then having sufficiently recovered from his said injuries"; and it then gives an estimate of the value of the services of appellee for a period of two years following the date mentioned, but it nowhere alleges that appellee agreed to serve appellant for any fixed period of time.

The evidence tends to show that the promise made on compromise was to give to appellee employment during his life, but it does not show that when appellee sought employment he proposed to render services for any named period, or so long as he might live and be able to perform the services contemplated.

We must take the contract as alleged in the petition to be the contract on which appellee must recover, if at all; and looking to that, there can be no doubt that whether appellee

should serve appellant, and the term of such service depended upon his own will.

It is very generally if not uniformly held, when the term of service is left to the discretion of either party, or the term left indefinite or determinable by either party, that either may put an end to it at will and so without cause: *Harper v. Hassard*, 113 Mass. 187; *Coffin v. Landis*, 46 Pa. St. 431; Wood on Master and Servant, secs. 183, 186, and citations.

When such a state of agreement exists, it is no breach of contract to refuse to receive further services; and the refusal to accept any at all it would seem at most would entitle the engaged servant only to nominal damages.

If the pleadings of appellee be accepted as true, there can be no doubt that there was an agreement that appellant would give employment to appellee; but as the period for which this should be done was dependent on the will of appellee to be exercised in the future, there was no contract binding appellant to employ appellee for any fixed period; the minds of the parties had not met as to a material element of the contract to which the agreement looked, — the period of service.

We are of opinion, however, while this is true, that the agreement made conferred on appellee the right to fix the period for which he would serve; and that if he had done so when he demanded employment he would be entitled to recover for the breach of the contract which would have been thus completed and made certain by the exercise and expression of his will, which, for a valuable consideration paid, he had acquired the right to exercise for this very purpose.

It was optional with appellee when the agreement was made whether he would serve appellant or not, but by the terms of the agreement he was given the right to fix the period he would serve if he willed to serve at all.

The right to this option could not be sustained on the theory of reciprocal promises as the consideration; for, as we have seen, the appellee at the time of the agreement made no express promise to serve, and no implied promise to that effect arises from the agreement, but the consideration to which we have before referred was sufficient to support the promise of appellant to permit appellee to fix the period of service and to have employment during that time, subject, however, to lose the right for inability to discharge the duties of the employment or by misconduct.

If, when appellee sought to enter the service of appellant, he

had fixed the period for which he would serve, then would there have been a complete contract, certain in its terms, by which both parties would have been bound.

In *Chicago etc. R. R. Co. v. Dane*, 43 N. Y. 241, it appeared that the railway company by letter offered to receive and transport from New York to Chicago railroad iron not to exceed a certain number of tons, during months specified, at a given rate per ton, and the party to whom the letter was directed merely assented to the proposal, but did not agree to deliver any iron for transportation, and it was held that there was no contract binding on either party for want of mutuality.

The action was brought by the person to whom the offer was made, and while holding as above stated, the court said: "Had there been a consideration given to the defendant for such option, the defendant would have been bound to transport for the plaintiff such iron as it required within the time and quantity specified, the plaintiff having its election not to require the transportation of any."

"There can be no doubt but that a contract may be so made as to be optional on one of the parties and obligatory on the other, or obligatory at the election of one of them," is the declaration of the supreme court of New York: *Giles v. Bradley*, 2 Johns. Cas. 253.

We need not go so far as to adopt the entire proposition, but the last branch of it is doubtless correct in all cases in which the option to make an agreement obligatory is supported by valuable consideration.

The case of *Bolles v. Sachs*, 37 Minn. 315, decided by the supreme court of Minnesota, involved a contract for services, supported by consideration, other than mutuality of contract, which was wanting, in that the period the plaintiff was to serve was not fixed by the agreement.

The defendants having declined to keep the plaintiff in their service, he brought an action for damages, and recovered eleven hundred dollars. In disposing of the case the court said: "The contract was perhaps effectual to give to the plaintiff the option to himself to fix the duration of it, but unless he exercised that election, and actually determined the period, so as to make certain that which by the terms of the contract was uncertain, he could recover only for the period of his actual service. . . . It is self-evident that courts can neither specifically enforce contracts nor award substantial damages for their breach when they are wanting in certainty.

Damages cannot be measured for the breach of an obligation when the nature and extent of the obligation is unknown, being neither certain nor capable of being made certain. It does not appear that the plaintiff ever determined that he would continue in this business for any definite period, or that he declared his election in this respect. Had he not been discharged, he might at will, at any time after making the contract, have himself abandoned the employment because of dissatisfaction, or for any other reason. Since the period of his service was thus left to depend upon his own volition, and never became fixed, it cannot be assumed that he would have voluntarily remained in this employment up to the time of trial,—more than a year,—so as to justify an assessment of damages on that theory. Perhaps the defendants could not, by abruptly breaking the contract by discharging the plaintiff, deprive him of the right to exercise his option to fix a definite and reasonable period of service. But though he might have exercised and declared his election even when he was notified of his discharge, and by thus tendering performance under the terms thus reduced to certainty, have placed himself in a position to recover damages measured with reference to the terms of the contract thus fixed, he does not appear to have done so."

This seems to us correct, if we do not lose sight of the fact that there is no binding contract for service for a future period until the term of its duration is fixed, while there may be a contract, if supported by sufficient consideration, which will give the right to one party to make the contract for service complete by fixing the term during which it becomes obligatory on the one to serve and on the other to accept and pay for the services.

It is urged, however, by appellee that he did fix the period of service,—that he elected to serve for life. He does not say so in his evidence. He states that such was the agreement at the time the compromise was made; but this is inconsistent with his pleadings. He does, in effect, say that by reason of the contract he demanded employment, but does not say that he elected to serve or declared an intention to serve during life or for any other period certain or that can be made certain.

We are of the opinion that a new trial should have been granted, on the ground that we have mentioned, and that a charge upon that subject, embodying the views herein expressed, should have been given.

It is urged that the contract set up was invalid under the statute of frauds. If the contract be as alleged in the pleadings, or as stated in the evidence, we are of the opinion that it is not subject to the objection urged against it: *Thouvenin v. Lea*, 26 Tex. 615; *Thomas v. Hammond*, 47 Id. 52; Bishop on Contracts, 1237-1281; Wood on Frauds, 270-272. In either event the contract might be performed within one year, and the performance complete within the true intent and understanding of the parties. It was more than two years from the time the compromise agreement was made until appellee sought service, and it is urged that this delay relieved appellant from obligation to employ, if it ever existed.

The evidence shows that appellee sought employment as soon as he recovered from the injuries under which he was suffering at the time the compromise was made sufficiently to be able to discharge the duties of the employment. Any agreement made must have been made in view of the fact that appellee was disabled at the time by his wounds, and with no expectation that he would resume labor until he could sufficiently recover from them to discharge the duties of engineer.

It is claimed that the court erred in permitting witnesses to state any contract or agreement other than that embodied in the judgment, and the ground of this objection is that such evidence tended to vary the effect of the judgment. The agreement of the parties for compromise was oral, and the judgment rendered does not undertake to embody it, nor does it even recite that it was rendered in accordance with an agreement. The question is decided adversely to appellant in *Thomas v. Hammond*, 47 Tex. 52.

For the errors noticed, the judgment will be reversed, and the cause remanded.

ATTORNEY AND CLIENT.—POWER OF ATTORNEY TO EFFECT COMPROMISE: See *Wabash etc. R'y Co. v. McDougall*, 126 Ill. 111, 9 Am. St. Rep. 539, and particularly cases cited in note 546. An attorney has no implied authority or power to compromise for his client: *Granger v. Batchelder*, 54 Vt. 248; 41 Am. Rep. 846; *Whipple v. Whitman*, 13 R. I. 512; 43 Am. Rep. 42; *Township of North Whitchell v. Keller*, 100 Pa. St. 105; 45 Am. Rep. 361; *Preston v. Hill*, 50 Cal. 43; 19 Am. Rep. 647.

MASTER AND SERVANT.—The contract of service must be certain and definite as to the nature and extent of the service to be performed, the place where and the person to whom it is to be rendered, as well as the compensation to be paid: *Parsons v. Traak*, 7 Gray, 473; 66 Am. Dec. 502. A contract of employment of a man in a particular service for as long as he may

desire to serve, unless he elects to fix a definite period of service, may be broken by the employer at any time: *Bolles v. Sachs*, 37 Minn. 315. A laborer for an unspecified period of employment is bound by an agreement that if he should quit work without giving notice for a certain time beforehand, he should forfeit his wages due at the date of quitting: *Pottsville etc. Co. v. Good*, 116 Pa. St. 385. Notice of the death of an employer usually puts an end to employment from month to month: *Weithoff v. Murray*, 76 Cal. 508.

BRADSTREET COMPANY v. GILL.

[72 TEXAS, 115.]

FOREIGN CORPORATION — WHETHER HAS AGENT IN COUNTY, QUESTION FOR JURY. — Where in a suit against a foreign corporation the petition alleges that such corporation has an agent in the county, and the defendant denies that it has such agent, and pleads in abatement to the jurisdiction of the court, if the testimony upon the question of agency is conflicting, the question of agency or not should be left to the jury, and it is error to withdraw it from them.

AGENCY OR NOT IS QUESTION OF LAW to be determined by the relations of the parties as they in fact exist under their agreements or acts. If relations exist between them which constitute an agency, it will be an agency, whether they understood it to be so or not. Their private intention will not affect it.

COMPLAINT IN LIBEL SUIT SHOULD PUT COURT IN POSSESSION OF THE LIBELOUS MATTER published, the language used, with such innuendoes as are necessary to explain what was meant by the language and to whom it applied. If the libel complained of consists in reporting the plaintiff's standing as a merchant "in blank," the complaint should state the fact with such explanations as to what was meant by the report as are necessary to show that the report was injurious and defamatory.

VENUE IN SUITS AGAINST CORPORATIONS. — Under the Texas statute, suit may be brought against foreign private or public corporations doing business in the state, in any county where such corporations have an agency or representation, without showing that their principal office is in that county.

ERRORS IN PUNCTUATION IN STATUTE WILL BE DISREGARDED if the meaning is obvious.

COMMERCIAL AGENCY'S REPORTS, EXPERT TESTIMONY TO EXPLAIN. — In an action against a commercial agency for publishing an alleged libelous report of the plaintiff's standing as a merchant, testimony of witnesses in possession of the key to the defendant's reports is admissible to explain what is indicated by reporting therein a merchant's standing "in blank," where it is alleged in plaintiff's petition that he was reported in blank. But the opinion of a witness as to the general effect of such a rating upon the credit of the plaintiff in commercial circles is inadmissible. It is for the jury to decide upon the general effect of the libel upon the plaintiff's character and credit as a merchant, without the influence of the opinions of witnesses.

PRIVILEGED COMMUNICATIONS, PUBLICATIONS OF COMMERCIAL AGENCIES ARE NOT, WHEN. — Publications of commercial agencies issued to their sub-

scribers generally are not privileged communications; they are only so when made in confidence to a subscriber who is interested in the pecuniary standing of the merchant reported.

COMMERCIAL AGENCY IS LIABLE FOR FALSE AND DEFAMATORY PUBLICATIONS, where other citizens would be liable.

PRIVILEGED COMMUNICATIONS, PUBLICATION OF, ACTIONABLE WHEN. — A privileged publication is actionable only when express malice is shown to have instigated it, or such gross disregard of the rights of the person injured as is equivalent to malice in fact.

MALICE MAY BE INFERRED FROM FACT OF FALSE PUBLICATION of libelous matter, when the communication is not privileged.

ACTION for libel. The opinion states the case.

Labatt and Noble, and Fowler and Maynard, for the appellant.

COLLARD, J. The appellant, the Bradstreet Company, being a foreign corporation, was sued in Bastrop County of this state for damages for an alleged libel upon plaintiff, Robert Gill, a merchant in the town of Bastrop. The business of the Bradstreet Company is that of a commercial agency. It is a foreign corporation, and does business in the United States and in Texas. It is alleged in the petition that the company is a foreign corporation, and that John M. Finney is its local agent in Bastrop County. Defendant denied that it had any agent in the county, and pleaded in abatement to the jurisdiction of the court. The court instructed the jury "that the evidence shows that defendant has an agent in Bastrop County, and that the court has jurisdiction of the case." It is insisted that this charge is error because there was evidence tending to show that defendant had no agent in the county, and that the charge was upon the weight of evidence. We think it was error to so charge the jury. The court should have instructed the jury that if Finney was employed or engaged by the company as its correspondent at the time the suit was brought to furnish it with information as to the commercial standing of merchants and business men in Bastrop County, to be used by the company in its reports to its customers and subscribers in conducting the business of the company, then he would be its agent, and he being a resident of the county, the court had jurisdiction of the case.

The letters of the company to Finney, coupled with the testimony that he made reports to it of the *status* of merchants in Bastrop, would support a finding that he was such agent; but there was other evidence which the jury might have considered, and from which they may have concluded that he

was not engaged by defendant as its agent at the time the suit was brought. The question of agency or not should have been left to the jury. It would have been error to instruct the jury, as requested by defendant, that Finney was not its agent; it was error to instruct them that he was such agent.

The court refused a charge asked by defendant, to the effect that if it was not the intention of defendant to make Finney its agent, and if it was not the intention of Finney to become its agent, to find for defendant on the plea in abatement. The refusal to give the charge is assigned as error. The intention of the parties, it is true, must control; but that intention is to be gathered from what was actually done or agreed by the parties, not from what they may have privately meant or supposed they meant. Agency or not is a question of law to be determined by the relations of the parties as they in fact exist under their agreements or acts. If relations exist which will constitute an agency, it will be an agency, whether the parties understood it to be or not. Their private intention will not affect it. It was not error to refuse the charge.

The court overruled defendant's general demurrer to the petition. This ruling is assigned as error, because the petition does not set forth with sufficient certainty the alleged false reports; because it does not set forth with sufficient certainty the actual damages sustained by plaintiff; because it does not show whether plaintiff's suit is for libel or slander, and it does not show whether the suit is for actual or exemplary damages, nor how much is claimed as actual and how much as exemplary damages; and because "it fails to show that the defendant has an agency or representation and principal office in Bastrop County. The petition does not set out *in hunc verba* the very language of the libel, but pretends to give its substance and meaning."

Our rules of pleading require that the petition shall set forth "a full and clear statement of the cause of action, and such other allegations pertinent to the cause as the plaintiff may deem necessary to sustain his suit," etc. It has been many times decided by our courts that the common-law distinctions as to pleading and its technicalities do not prevail with us, but that a clear and logical statement of the cause of action is all that is necessary. A clear statement of the facts constituting the cause of action cannot, however, be dispensed with. The character of the suit must be the guide to the pleader, and enough must be stated to constitute a cause

of action. In a suit on a note it will be sufficient to state the substance and legal effect of the note; not so in a suit for libel. A libel suit is based on language or its equivalent.

The complaint in a libel suit should put the court in possession of the libelous matter published, the language used, with such innuendoes as are necessary to explain what was meant by the language, and to whom it applied, so as to enable the court to determine whether the words are actionable. In this case the complaint attempts to give the meaning of the words or libel only, without stating what the libel was. If the libel consisted in reporting plaintiff's standing as a merchant "in blank," the complaint should have informed the court and the defendant of the fact, with such explanations as to what was meant by the report as were necessary to show that the report was injurious and defamatory. This is not a case where the pleader must from the nature of the publication resort to a verbal description of the slanderous matter, as it would be when movements, postures, or pictures are used. Plaintiff could have stated his cause of action, as it was in clear terms. He has not done so. It is not sufficient in this kind of a suit to state the substance of the language used or its meaning. We believe the general demurrer ought to have been sustained: See Townshend on Slander and Libel, secs. 329-335 inclusive.

The damages claimed by plaintiff are compensatory only. He says he suffered great damage in the conduct of his business and in his commercial standing. He does not ask for vindictive damages. The allegations of the petition were sufficient upon this subject.

This is a suit for libel. It was unnecessary for plaintiff to so characterize it by averment. In order to maintain the suit in Bastrop County it was not necessary, as appellant seems to think, for plaintiff to allege that defendant had an agent or representative in the county, and that its principal office was also in the county. It was enough to allege that it had at the time the suit was brought an agent or representative in the county, or that the principal office was in the county. Either allegation was sufficient.

The statute (Act of March 31, 1885) in force at the time the suit was brought provides that foreign private or public corporations doing business in this state may be sued "in any county where the cause of action or a part thereof accrued, or in any county where such company may have an agency

or representation in the county in which the principal office may be situated, or," etc.

There is no comma after the word "representation" in the act, but to so read it would render it utterly senseless. Reading it with a comma, it becomes perfectly clear and intelligible, and means that "suit may be brought in any county where the company has an agency, or representative, in the county where its principal office is situated, or," etc. The rules of construction demand that the act should be read so as to give it sense and meaning,—the meaning it was evidently intended to have. The seeming confusion in the language and punctuation was corrected by amendment April 4, 1887.

We think there was no error, as insisted by appellant, in permitting witnesses in possession of the key to defendant's reports to explain what was indicated by reporting a merchant's standing "in blank." Plaintiff was reported in blank, and it was proper to explain by testimony what the blank represented. The petition should have contained allegations of the fact as published, with the proper innuendo, as a predicate for the testimony. The testimony showing the effect of such a rating upon the credit of plaintiff—that is, the general effect in commercial circles—was inadmissible. It was only the opinion of the witnesses about a matter that the jury were capable of judging, and which it was their duty to determine. If the rating meant that plaintiff had no credit and no capital, and such rating was false, it was libelous, and actionable *per se*, and the jury should have been left to estimate its effect without the influence of the opinions of witnesses, however competent to judge of such matters: *Townshend on Slander and Libel*, 297. If plaintiff suffered special damage by loss of credit, the injury and the cause of it were susceptible of proof, direct proof by the persons with whom his credit suffered. If there was a general loss of credit or breakdown of commercial character, and it was not susceptible of proof, it was a matter of opinion for the jury only, unaided by the opinions of outsiders.

There was some evidence, though slight, tending to show that plaintiff's credit was injured by the publication, and that he suffered some damage. It was not the province of the court to judge of the weight of the evidence, any more than it was to direct the jury as to the amount of damages they should find for the injury. Besides this, it was the privilege of the jury to decide upon the general effect of the libel upon the plain-

tiff's character and credit as a merchant. We cannot therefore agree with appellant that the charge upon this subject was unauthorized by the evidence. The assignment of error on this point is untenable.

The twelfth assignment of error is also untenable. It does not appear, from the evidence, that if plaintiff was damaged at all it was by the publication made prior to January, 1885. On the contrary, it does appear that if he was injured it was by the publication of January, 1885. The jury expressly found their verdict on that publication, and, we think, correctly. Limitation did not bar the publication of January, 1885.

There are several assignments of error predicated upon the refusal of the court to give requested charges of defendant, to the effect that the publication complained of was a privileged communication, and that such being the case, malice in fact must be established to entitle a recovery. These assignments may all be considered together.

We cannot accede to the proposition that the publications of commercial agencies, issued to their subscribers generally, are privileged communications. They are only privileged when made in confidence to a subscriber who is interested in the pecuniary standing of the merchant reported. In *Erber v. Dun*, tried in the United States circuit court of Arkansas, Colwell, district judge, expressed the correct doctrine, as we understand it. He said: "It is indisputable under the evidence that whatever was said orally by defendants about plaintiffs and their business was said in good faith and in confidence to their subscribers, who were by reason of their business relations with the plaintiffs interested in knowing their financial and business standing, and in answer to requests made by their subscribers in relation thereto. This being so, the statements thus made by defendants are privileged communications": 12 Fed. Rep. 530.

A case more nearly in point is that of *Sunderlin v. Bradstreet*, decided by the court of appeals of New York: 46 N. Y. 188; 7 Am. Rep. 822. In that case plaintiffs were merchants; defendants were proprietors of a mercantile agency, and published a semi-annual volume giving the standing and financial credit of merchants in the United States and Canada, and also weekly sheets to their subscribers in the city of New York. In the weekly sheet they published that plaintiffs had failed; the statement was false. Plaintiffs called on defendants for the names of the persons furnishing the information,

which defendants refused to give, but published a retraction of the report the next week. It was held that "the defendants in making the communication assumed the legal responsibility which rests upon all who without cause published defamatory matter of others,—that is, of proving the truth of the publication or responding in damages to the injured party." It was further said that "the communication of the libel to those not interested in the information was officious and unauthorized, and therefore not protected, although made in the belief of its truth if it were in point of fact false."

The very question under consideration was recently (in 1887) before the court of errors and appeals of New Jersey: *King v. Patterson*, 49 N. J. L. 417; 60 Am. Rep. 622. The court was divided, but a majority of the court held to the doctrine announced in *Sunderlin v. Bradstreet*, *supra*. Both sides of the question were fully discussed in the case by the disagreeing judges, and such authorities as bear upon the subject were cited and reviewed.

We think the conclusion reached by a majority of the court the correct one. A commercial agency is a lawful business, and when conducted lawfully is a benefit to society and trade; but no just reason can be given for a rule that would exempt it from liability for false and defamatory publications where other citizens would not be exempt. If an individual voluntarily or for profit give false and injurious information to persons interested in the trade and commercial standing of another at the time the information is given, such communications would be privileged; but if he furnish the same information to others not so interested, to traders and merchants as a class, the communication would not be privileged. A commercial agency organized for the purpose of furnishing such information, keeping an intelligence office for profit, should, it seems to us, be held to the same accountability as the ordinary citizen. The acts of the agency, properly done, are no more meritorious or beneficial than when done by an individual, except that they may be more extended and cover more transactions. Impartial justice cannot imagine a sound reason for a distinction in favor of an agency. It amounts to this at least, and no more: the business of a commercial agency is lawful when conducted lawfully; it will be protected so long as it does not transgress the rights of others. It is not entitled to any privileges denied the ordinary citizen. If it is a greater benefit to trade than the occasional acts of the individual, be-

cause more extended and continuous in its operations, it is for the same reason capable of doing more harm by its false reports; its wrong-doing is more difficult to remedy. Because it has a monopoly of such intelligence is no reason for giving it a privilege to do a wrong by an improper publication of false statements, though the publication may be in the usual course of the business it has adopted. It has the right, then, to the protection of a privileged communication when made to persons at the time interested in the information, even though the information may be false; but when communicated to its general subscribers it has no such right. If the publication is privileged, no suit can be maintained against it, unless express malice is shown to have instigated it, or such gross disregard of the rights of the person published as will be equivalent to malice in fact. Even when the communication is not privileged, malice must be shown to authorize a recovery, but in such case negative facts may indicate the malice, as that the publication was false, and was made without legal excuse; the malice may be inferred from the fact of a false publication of libelous matter. When the publication is privileged, the malice so implied from the false and defamatory publication is deemed to have been met and rebutted, in which case, as before stated, malice in fact must be shown to warrant a recovery, and such malice is defined to be ill-will, bad or evil motive, or such gross indifference to the rights of others as will amount to a willful or wanton act: *Holt v. Parsons*, 23 Tex. 9; 77 Am. Dec. 49; *Behee v. Missouri Pac. R'y Co.*, 71 Tex. 424, and authorities there cited. It was shown in this case that the alleged libelous matter was issued to defendants' general subscribers in the United States. If the fact published was false and libelous, malice could be inferred from that fact (though it would not be proper to point out to the jury in the charge the facts from which the malice could be inferred), and if it is shown that plaintiff's credit and reputation were injured by such publication, he could recover damages therefor, besides any other special damages he may show he sustained in his business by reason of such publication. There are a great number of assignments of error presented and apparently relied on in appellant's brief, some of which we may not have more than incidentally noticed, but we believe we have given our views of every material question raised on the trial, so that there need be no difficulty in the law of the case, as we understand it, upon another trial. Because of the errors

above pointed out in the rulings of the court below, we are of opinion the judgment should be reversed, and the cause remanded for a new trial.

AGENCY. — The fact of agency created and proved by writing is a question of law for the court: *Loudon Savings Soc. v. Savings Bank*, 36 Pa. St. 498; 73 Am. Dec. 390; but otherwise the question of agency is generally one of fact for the jury to determine: *Id.*; *Morrison v. Whiteside*, 17 Md. 452; 79 Am. Dec. 661.

LIBEL AND SLANDER — COMPLAINT. — Evidence of utterances made by defendant, but not alleged in the complaint, are inadmissible in behalf of plaintiff: *Stern v. Loewenthal*, 77 Cal. 340. A complaint in an action of slander is good as against a demurrer, when it contains an allegation of words uttered by defendant which fairly impute a crime to plaintiff: *Thomas v. Blasdale*, 147 Mass. 438. An information for libel is not defective for merely failing to state the mode of publication: *State v. Dowd*, 39 Kan. 412. But when a complaint charges the libelous publication of certain words, the whole libelous article should be admissible in evidence: *Mosier v. Stoll*, 119 Ind. 245; *Newman v. Stein*, 75 Mich. 402; *ante*, p. 447; *O'Connor v. Sill*, 60 Mich. 178. Special damages need not be alleged when the words are actionable *per se*: *Halley v. Gregg*, 74 Iowa, 563; note to *Newman v. Stein*, *ante*, p. 452. A complaint alleging that defendant called plaintiff a "thief" is good, because it imputes a crime to plaintiff: *Harman v. Cundiff*, 82 Va. 239. When a slander has been repeated, the complaint need not allege the repetition in order that it may be shown in evidence: *Halley v. Gregg*, *supra*.

MALICE IN ACTIONS FOR LIBEL. — Malice is presumed from a libelous publication: *Byam v. Collins*, 111 N. Y. 143; 7 Am. St. Rep. 728, and note; or it may be proved by circumstantial evidence: *Behes v. Missouri etc. R'y Co.*, 71 Tex. 424; such as the repetition of the libel or slander: *Halley v. Gregg*, 74 Iowa, 563. But in privileged communications actual malice must be affirmatively shown to entitle plaintiff to recover: *Chaffin v. Lynch*, 84 Va. 884.

REPORTS OF COMMERCIAL AGENCIES. — A report of a commercial agency, made maliciously, cannot be regarded as a privileged communication: *Lourey v. Vedder*, 40 Minn. 475; *Johnson v. Bradstreet Co.*, 77 Ga. 172; 4 Am. St. Rep. 77, and cases in note 79.

MISSOURI PACIFIC RAILROAD COMPANY v. FAGAN.

[73 TEXAS, 127.]

DECLARATIONS OF RAILWAY CONDUCTOR, ADMISSIBILITY OF. — The declaration of a railway conductor, while running a train, as to the time it will be due at a station on his route, is admissible in evidence.

USAGE OR CUSTOM, WHAT MUST BE SHOWN TO JUSTIFY INTRODUCTION OF. — To warrant the introduction of a usage or custom in the course of trade, it is necessary to show that it is uniform, reasonable, and notorious, and the custom must be established by a witness who is experienced in such transactions, and can testify to the facts constituting the custom. Testimony introduced to show that because of a usage certain stock was not in fact delivered is not admissible, where there is positive

proof that it was not delivered, and there is nothing to show the extent of the custom or the witness's means of knowledge.

KNOWLEDGE OF MARKET VALUE IS FACT KNOWN FROM INFORMATION, and not bare matter of opinion.

USAGE WHICH IS CONTRARY TO LAW OR PUBLIC POLICY CANNOT BE GOOD; and therefore a custom of railroads not to receive for transportation any live-stock, unless under certain conditions modifying their common-law liability, is bad, because railroads cannot legally refuse to ship live-stock.

COMMON CARRIER HAS NO RIGHT TO DEMAND OF SHIPPER WAIVER OF HIS RIGHTS as a condition precedent to receiving freight.

CUSTOM REQUIRING OWNER TO GO ON SAME TRAIN WITH HIS STOCK, to feed and water it, cannot be sustained, because the law imposes this duty on the carrier, and the latter cannot transfer it to the shipper by custom.

CUSTOM CANNOT EXTINGUISH LIABILITY IMPOSED BY LAW UPON COMMON CARRIERS for a failure to perform their duties and obligations, nor can it require the injured party to limit such liability by agreement.

MEASURE OF DAMAGES FOR TOTAL LOSS OF STOCK SHIPPED. — The measure of damages for the total loss of mares with foal shipped by a railroad company is the price they would have brought in the market at the place of destination in the condition they would have been in had the company exercised due and necessary care of them while in its possession, less the freight. In case of partial loss, the measure of damages is the difference between such price, less the freight, and their value at such destination at the time of their arrival.

ACTION to recover damages. The opinion states the case.

J. D. Guinn, for the appellant.

Cocks, Denman, and Franklin, for the appellees.

COLLARD, J. This suit was brought by appellees, plaintiffs below, against appellant, defendant below, for injuries to and loss of two car-loads of horses shipped by plaintiff on defendant's railroad September 21, 1885, from San Antonio, Texas, to Memphis, Tennessee. The cause was tried by the judge, both on the law and the facts, and judgment rendered for plaintiff for eighteen hundred dollars. Defendant appealed.

The error assigned by appellant upon the ruling of the court in refusing defendant's application for a continuance need not be considered, as the case will be reversed on other grounds, and as there is no new feature of the law of continuances presented in the application. The action of the court in overruling defendant's general demurrer to the petition is assigned as error. No error is pointed out in the assignment, and upon inspection of the petition we fail to discover any that would require a revision of the court's ruling.

The court permitted Fagan to testify, over defendant's objection, that the conductor of the train on which the horses were shipped informed him at what time the train was due at

Palestine from San Antonio. Defendant duly excepted, and assigns the ruling as error, because the statement of the conductor was not the best evidence.

It is sufficient for us simply to say that there was no error in the ruling.

It is claimed by appellant that the court erred in permitting witness Fagan to state what the custom of the railroad was in delivering stock at their destination.

It seems the object of the testimony was to show that Jones & Co. held the horses for the railroad company, and that plaintiffs were thus relieved of the care of them while they were in Memphis. The testimony objected to was as follows: Fagan testified that "it was customary for railroad companies to turn over stock at shipping-stations, and at destination of stock, just as his were turned over to J. C. Jones & Co. at Memphis." This evidence was introduced in connection with other statements of Fagan while on the stand, that the horses were not turned over to him on arrival at Memphis; that Jones & Co. took possession of them and put them in their stock-yards, and that Jones told him he held them for the railroad for freight charges. The question of fact was, Were the horses delivered to Fagan at Memphis? The custom of railroads was invoked to aid plaintiffs' direct proof upon this subject. The question of custom does not seem to be of more than incidental importance in this case. The object of the evidence was not to establish any obligation on the part of the company by proof of a custom, or to show that it was the duty of the carrier, fixed by usage in the course of business, to hold the horses at the place of destination, upon which plaintiffs seek to recover in this action; but the object was to show that because of such usage the stock was not in fact delivered. The fact of delivery or not was susceptible of positive proof, and there was positive proof upon the question. It seems hardly probable that the company would deliver the horses until the freight had been paid, and it is not claimed that they did. However, we may say that to warrant the introduction of usage or custom in the course of trade, it is necessary to show that it is uniform, reasonable, and notorious, and the custom must be established by a witness or witnesses who are experienced in such transactions, and who can testify to the facts constituting the custom. Opinions are not sufficient, nor are reports or reputation: 2 Greenl. Ev., secs. 251, 252; 2 Redfield on Railways, sec. 184. The evidence objected

to does not come up to the required standard, so the assignment of error must be sustained.

Appellant says the court erred in "permitting Fagan to give his opinion as to what the stock would have been worth at Memphis if they had not been injured in transportation." Knowledge of the market value of an article is hardly an opinion; it is a fact known from information. If a witness is not fully qualified to state the fact, a cross-examination will show it. Such matters go to the weight of the evidence and the credibility of the witness, and not to the competency of his testimony. The question here raised as to the correct measure of damages will be noticed hereafter.

The seventh and ninth assignments of errors are to the same effect, and are based on the refusal of the court to allow defendant to prove by the witness Michelson that the universal custom of all railroads, and particularly that of defendant, had been at all times, and still was, not to ship any live-stock, or receive the same for shipment, of any kind whatever,—1. Unless the owner or agent would accompany the stock on the same train, and at his (the shipper's) expense and risk feed and water such stock at the points where it is unloaded for that purpose; 2. Unless the shipper would hold the railway harmless against ordinary delays in taking up freight; 3. Unless the shipper expressly agrees that, as a condition precedent to his right to any damages for any loss or injury to his stock during transportation, or previous to loading for shipment, such shipper will give notice, verified by affidavit, of his claim therefor to some general officer of the railroad company, or the nearest station-agent, before the stock is removed from the point of shipment or destination, and before the stock is mingled with other stock; 4. Unless the shipper agrees that in case of total loss of stock not more than the actual cash value of the same at the place of shipment shall be the measure of damages; 5. Without furnishing the shipper a free pass over the line of shipment, along with the same train, to the place of destination of the stock.

Defendant offered to show that such customs were general, and known to plaintiffs as well as to all shippers of live-stock over railroads, and specially on defendant's road. The objection made to the evidence was, that it would limit the liability of the carrier. It was not objected that these stipulations were set up in the answer as existing in contract between the par-

ties, nor that the proof showed, as it did, that there was a contract containing all the agreements of the parties.

Usages of trade, Mr. Greenleaf says, should be sparingly adopted by the courts as rules of law. "Their true office is to interpret the otherwise intermediate intentions of parties, and to understand the nature and extent of their contracts arising, not from express stipulation, but from mere implications and presumptions, and acts of doubtful and equivocal character, and to fix and explain the meaning of words and expressions of doubtful or various senses": 2 Greenl. Ev., sec. 251. Usages of trade are admissible, however, to show the relative duties and rights of parties as incidents of contracts and transactions; but the usage sought to be invoked must have all the elements of a usage as to certainty, uniformity, notoriety, and reasonableness, and it must not be contrary to law. A usage cannot be a good usage if it is contrary to law or public policy. In the case before us, for example, the defendant offered to show a custom of railroads not to receive for transportation any live-stock unless under certain conditions modifying their common-law liability. Such a custom would be bad, because railroads cannot legally refuse to ship live-stock. A common carrier has no right to demand of a shipper a waiver of his rights as a condition precedent to receiving freight. If such a custom should be ever so common and uniform, it could not be sustained, because it (the custom) would be against the law.

Let us look at the particulars of the custom proposed in this case. It required the owner to go along on the same train with his stock, to feed and water them at his own risk and expense. The law imposes this duty on the carrier, and the carrier cannot transfer it to the shipper by custom. The shipper might agree to go with his stock, and to feed and water them at his own expense, but he could not be compelled to do so by custom, because the law requires this duty of the carrier. This custom also required that the owner of the stock would hold the railroad harmless against ordinary delays in taking up freight. If the law held the railroad harmless for such delays, a custom would not be necessary; if the law held it liable, a custom could not repeal or suspend the law. It was also required by the custom proposed that the shipper should expressly agree that, as condition precedent to his right to any damages for any loss or injury to his stock during transportation, he should give notice of his claim therefor,

verified by his affidavit, to some general officer of the railroad, or to the nearest station-agent, before the stock was removed from the point of shipment or destination. If the shipper should make a contract to give such notice, it might be binding under our law, if it were shown that there was such officer or agent at the point of destination upon whom the notice could be conveniently served. The custom, in this case, did not propose to show that there was such officer or agent at the point of shipment or destination, without which it would be an unreasonable custom. It would be an unreasonable stipulation in a contract limiting the carrier's liability, and as an express contract, for that reason, it could not be enforced: *Missouri Pac. R'y Co. v. Harris*, 67 Tex. 166. But we will not be understood to hold that the custom, if it had been shown to be reasonable, could be sustained. A custom cannot require that the shipper shall expressly agree to a limitation of his right to damages. The law of the land regulates such matters, and fixes liability upon failure to perform duties and obligations of carriers, and when so fixed, a custom cannot extinguish it, or require the injured party to limit it by agreement.

We may say the same of the stipulation in the proposed custom requiring the shipper to agree, as a condition to the right to ship his stock on a railroad, that in case of total loss of stock the measure of damages should not be more than the cash value of the same at the place of shipment. Such a custom would be illegal, and the carrier could not require that the shipper should make such a special contract: See *Gulf etc. R'y Co. v. Trawick*, 68 Tex. 314, 2 Am. St. Rep. 494, in addition to other authorities cited.

Appellant claims that the court erred in sustaining plaintiff's objection to testimony of Fagan, sought to be elicited by defendant while he was being cross-examined, that his agreement was to feed and water the stock, and attend them, at his own expense.

It is sufficient to say in answer to this assignment that the evidence of Fagan showed that the contract of shipment was in writing; the objection to the evidence was, that it was not the best evidence. The objection was well taken, and should have been sustained.

But one other assignment of error need be noticed, as it will dispose of the rest, which relate to the same subject more or less definitely. The court found, as a conclusion of law, that

the measure of damages was the difference between the market value of the stock in the condition they arrived at destination and their market value had they arrived in good order and condition. This rule for the measure of damages is assigned as error. We agree with the appellant upon this subject.

The court found and the evidence showed that many of the mares shipped were with foal, and that they lost their foal on the way, and when they arrived at Memphis they were practically worthless. The most of the cargo were mares.

The railway company was bound to deliver them in a reasonable time, and it was bound to exercise due care of the animals while in its possession, and while in course of transportation. The correct measure of damages for total loss, there being what is called inherent defect in such freight, and especially so in mares with foal, would be the price, less the freight charges, they would have brought in the market at the place of destination in the condition they would have been in had the company exercised due and necessary care of the same while in its possession, and this price, less freight charges, at the time they should have arrived if shipped and delivered in a reasonable time. In case of partial loss, the measure of damages would be the difference in such price, less freights above stated, and the value of the animals at the same place at the time of arrival: *Railway Co. v. Harris, supra*. The company would not be liable for damages resulting from inherent vices and defects in the animals; so if the defendant company performed all its obligations and duties as a public carrier in transporting the animals, and loss or depreciation of price resulted from natural defects, no damages could be had. The principle is, the company would be liable for no injury arising from such defects, and the defects must be considered in estimating damages, if any arise. The judgment of the court below should be reversed and remanded for a new trial.

STIPULATIONS WHICH RAILROAD COMPANY MAY NOT EXTORT FROM SHIPPERS, AND EFFECT OF SUCH STIPULATIONS IF EXTORTED. — Railroad companies doing business as common carriers may not extort from their customers stipulations in their contracts for the transportation of property which are contrary to law; and if such stipulations are extorted from shippers, they will be declared void and of no effect. Except in those states where a contrary rule is established by the constitution or by statute, it is well settled that common carriers may by express contracts fairly entered into limit their common-law liabilities as insurers. In Iowa, it is provided by statute that

"no contract, receipt, rule, or regulation shall exempt any corporation engaged in transporting persons or property by railway from liability of a common carrier, or carrier of passengers, which would exist had no contract, receipt, rule, or regulation been made or entered into": Iowa Code, sec. 1308. And this provision has been held to apply not merely to contracts without consideration, but to all contracts by which it is attempted to limit the carrier's liability: *Brush v. S. A. & D. R'y Co.*, 43 Iowa, 554; *McCoy v. K. & D. M. R'y Co.*, 44 Id. 424. In Texas, it is provided by statute that "railroad companies and other common carriers of goods, wares, and merchandise, for hire, within this state, on land or in boats or vessels on the waters entirely within the body of this state, shall not limit or restrict their liability as it exists at common law, by any general or special notice, or by inserting exceptions in the bill of lading or memorandum given upon the receipt of the goods for transportation, or in any other manner whatever, and no special agreement made in contravention of the foregoing provisions of this article shall be valid": Rev. Stats. Tex., 1879, art. 278, tit. 13, p. 48. And section 4 of article 11 of the constitution of Nebraska provides that "the liability of railroad corporations as common carriers shall never be limited": See *Missouri Pac. R'y Co. v. Vandeventer*, Sup. Ct. Neb., 1889.

But even where common carriers are by law permitted to limit their liability by express contract, with the exception of New York, it is held that they cannot, even by express contract founded upon a valid consideration, exempt themselves from liability for loss or damage resulting from the negligence of themselves or of their agents or servants: *Railroad Co. v. Lockwood*, 17 Wall. 357; *Railroad Co. v. Pratt*, 22 Id. 123; *Bank of Ky. v. Adams Etc. Co.*, 93 U. S. 174; *Liverpool Etc. Co. v. Phenix Ins. Co.*, 129 Id. 397; *Steele v. Townsend*, 37 Ala. 247; 79 Am. Dec. 49; *Mobile & O. R. Co. v. Hopkins*, 41 Ala. 486; 94 Am. Dec. 607; *South and North Ala. R. R. Co. v. Henlein*, 56 Ala. 368; 23 Am. Rep. 578; *East Tenn. Etc. R. R. Co. v. Johnston*, 75 Ala. 596; 51 Am. Rep. 489; *Little Rock Etc. R. R. Co. v. Talbot*, 39 Ark. 523; *Hooper v. Wells*, 27 Cal. 11; 85 Am. Dec. 211; *Merchants' D. & T. Co. v. Cornforth*, 3 Col. 280; 25 Am. Rep. 757; *Welch v. Boston & A. R. R. Co.*, 41 Conn. 333; *Camp v. Hartford Etc. Co.*, 43 Id. 333; *Flinn v. Philadelphia Etc. R. R. Co.*, 1 Houst. 469; *Berry v. Cooper*, 28 Ga. 543; *Georgia R. R. Co. v. Gann*, 68 Id. 350; *Illinois Cent. R. R. Co. v. Smyser*, 38 Ill. 354; 87 Am. Dec. 301; *Erie R'y Co. v. Wilcox*, 84 Ill. 239; 25 Am. Rep. 451; *Michigan Etc. R. R. Co. v. Heaton*, 37 Ind. 448; 10 Am. Rep. 89; *Ohio Etc. R. R. Co. v. Selby*, 47 Ind. 471; 17 Am. Rep. 719; *St. Louis Etc. R. R. Co. v. Piper*, 13 Kan. 505; *Kansas Pac. R'y Co. v. Reynolds*, 17 Id. 251; *Kansas City Etc. R. R. Co. v. Simpson*, 30 Id. 645; 46 Am. Rep. 104; *Rhodes v. Louisville Etc. N. R. R. Co.*, 9 Bush, 688; *Louisville Etc. R. R. Co. v. Hedger*, 9 Id. 645; 15 Am. Rep. 740; *Louisville Etc. R. R. Co. v. Brownlee*, 14 Bush, 590; *School District in Medfield v. Boston Etc. R. R. Co.*, 102 Mass. 552; 3 Am. Rep. 502; *Hawkins v. Great Western R. R. Co.*, 17 Mich. 57; *Shriver v. S. C. & St. P. R. R. Co.*, 24 Minn. 506; 31 Am. Rep. 353; *Moulton v. St. Paul Etc. R'y Co.*, 31 Minn. 85; 47 Am. Rep. 781; *Southern Etc. Co. v. Hunnicutt*, 54 Miss. 566; 28 Am. Rep. 385; *New Orleans Etc. R. R. Co. v. Faler*, 58 Miss. 911; *Chicago Etc. R. R. Co. v. Moss*, 60 Id. 1003; 45 Am. Rep. 428; *Chicago Etc. R. R. Co. v. Abels*, 60 Miss. 1017; *Levering v. Union T. & I. Co.*, 42 Mo. 88; 97 Am. Dec. 320; *Clack v. St. Louis Etc. R. R. Co.*, 64 Mo. 64; *McFadden v. Missouri Pac. R'y Co.*, 92 Id. 343; 1 Am. St. Rep. 721; *Drew v. R. L. T. Co.*, 3 Mo. App. 495; *A. & N. R. R. Co. v. Washburn*, 5 Neb. 117; *Ashmore v. Pennsylvania S. T. & T. Co.*, 28 N. J. L. 180; *Capehart v. S. & R. R. R. Co.*, 81 N. C. 438; 31 Am. Rep. 505; *Branch*

v. Wilmington etc. R. R. Co., 88 N. C. 573; *Welsh v. Pittsburg etc. R. R. Co.*, 10 Ohio St. 65; 75 Am. Dec. 490; *Union Etc. Co. v. Graham*, 26 Ohio St. 595; *United States Etc. Co. v. Backman*, 28 Id. 144; *Seller v. Steamship Pacific*, 1 Or. 409; *Camden & A. R. R. Co. v. Baldauf*, 16 Pa. St. 67; 55 Am. Dec. 481; *Pennsylvania R. R. Co. v. Butler*, 57 Pa. St. 335; *Empire Transportation Co. v. Wametta Oil Co.*, 63 Id. 14; 3 Am. Rep. 515; *Pennsylvania R. R. Co. v. Miller*, 87 Pa. St. 395; *Swindler v. Hilliard*, 2 Rich. 286; *Nashville etc. R. R. Co. v. Johnson*, 6 Heisk. 271; *Missouri Pac. R'y Co. v. Harris*, 67 Tex. 166; *Missouri Pac. R'y Co. v. Ivy*, 71 Id. 409; 10 Am. St. Rep. 758; *Virginia & T. R. R. Co. v. Sayers*, 26 Gratt. 328; *Maslin v. Baltimore & O. R. R. Co.*, 14 W. Va. 180; 35 Am. Rep. 748; *Brown v. Adams Etc. Co.*, 15 W. Va. 812; *Rintoul v. New York Cent. etc. R. R. Co.*, 17 Fed. Rep. 905.

In New York it is held that a common carrier may, by express contract based on a sufficient consideration, exempt himself from liability for loss or damage resulting from any degree of negligence on the part of himself or of his agents and servants: *Bissell v. New York Cent. R. R. Co.*, 25 N. Y. 442; 82 Am. Dec. 369; *Poucher v. New York Cent. R. R. Co.*, 49 N. Y. 263; 10 Am. Rep. 364; *Cragin v. New York Cent. R. R. Co.*, 51 N. Y. 61; 10 Am. Rep. 559; *Mynard v. Syracuse etc. R. R. Co.*, 71 N. Y. 180; 27 Am. Rep. 28. And see note to *Bissell v. New York Cent. R. R. Co.*, 82 Am. Dec. 379, where a large number of other New York cases on this subject is collected. But upon the question of the effect of a stipulation exempting a common carrier from responsibility for negligence, the United States courts are not bound by the decisions of the courts of the state in which the contract is made: *Liverpool etc. Co. v. Phenix Ins. Co.*, 129 U. S. 397.

STIPULATIONS MUST NOT BE UNREASONABLE. — Stipulations in a contract by which a common carrier seeks to limit his common-law liability must, in order to be valid and binding upon the shipper, be just and reasonable, and be supported by a proper consideration. A stipulation extorted from the shipper without any reduction of rate of transportation, or other consideration, is invalid, and not binding upon him: *Rosenfeld v. Railway Co.*, 103 Ind. 121; *Adams Etc. Co. v. Harris*, Sup. Ct. Ind., May, 1889; *McFadden v. Missouri Pac. R'y Co.*, 92 Mo. 343. Contracts limiting the carrier's liability will not bind the shipper, unless they are fairly made and fully understood by him: *Adams Etc. Co. v. Nock*, 2 Duvall, 562; 87 Am. Dec. 510. Stipulations extorted from the shipper by fraud or coercion, or by taking undue advantage of the position of the party, will be held void and of no effect. The carrier has no right by means of such stipulations to ensnare or defraud his customer: *Southern Etc. Co. v. Caperton*, 44 Ala. 101; 4 Am. Rep. 118; *Louisville & N. R. R. Co. v. Sherrod*, 84 Ala. 178; *Goggin v. Kansas Pac. R'y Co.*, 12 Kan. 416; *Capehart v. Seaboard & R. R. Co.*, 81 N. C. 438; 31 Am. Rep. 505. In the case of *Goggin v. Kansas Pac. R'y Co.*, *supra*, Kingman, C. J., delivering the opinion of the court, said: "But such a contract should be reasonable, and not such as to be a snare or fraud upon the public." And Clopton, J., delivering the opinion of the court in *Louisville & N. R. R. Co. v. Sherrod*, 84 Ala. 182, said: "A carrier will not be permitted to take advantage of his position to coerce the shipper to agree to a limited value by a threatened charge of a high and unreasonable rate, if such agreement is not made. There must be no imposition, coercion, or undue advantage. Neither can the carrier stipulate for immunity from liability for fraud, or for intentional or reckless negligence. Such special contracts may be avoided by willful or wanton negligence in disregard of the rights of the shipper." A stipulation to be valid must be reasonable, and to be reasonable it must not

stipulate for the exemption of the carrier from liability for the consequences of the carrier's negligence, or for lack of proper appliances for the transportation of the property contracted to be carried: *Alabama etc. R. R. Co. v. Little*, 71 Id. 611; *Ortt v. Minneapolis etc. R'y Co.*, 36 Minn. 396; *Hutchinson v. Chicago etc. R'y Co.*, 37 Id. 524; *New Orleans etc. R. R. Co. v. Faler*, 58 Miss. 911; *Ozley v. St. Louis etc. R'y Co.*, 65 Mo. 628; *McFadden v. Missouri Pac. R'y Co.*, 92 Id. 343; 1 Am. St. Rep. 721; *Grogan v. Adams E. Co.*, 114 Pa. St. 523; 60 Am. Rep. 360; *Pennsylvania R. R. Co. v. Railroad*, 119 Pa. St. 577; 4 Am. St. Rep. 670; *Wallingsford v. Columbia & G. R. R. Co.*, 26 S. C. 258; *Dillard v. L. & N. R. R. Co.*, 2 Lea, 288; *Coward v. East Tenn. etc. R. R. Co.*, 16 Id. 225; 57 Am. Rep. 226; *Marr v. Western U. T. Co.*, 85 Tenn. 529; *Merchants' D. T. Co. v. Bloch*, 86 Id. 392; 6 Am. St. Rep. 847; *Express Co. v. Caldwell*, 21 Wall. 264; *Liverpool etc. Co. v. Phenix Ins. Co.*, 129 U. S. 397.

In the case of *Southern Express Co. v. Caperton*, 44 Ala. 101, 4 Am. Rep. 118, the plaintiff delivered to the defendant for transportation a package of money, and took a receipt therefor, which specified that there should be no liability for any loss, unless the claim therefor should be made at the receiving-office of the defendant within thirty days after the date of the receipt. It appeared that the plaintiff was not informed of the non-delivery of the package until a year had elapsed from the date of the receipt. In an action for the non-delivery, it was held that the plaintiff could recover, notwithstanding the limitation in the receipt. Saffold, J., who delivered the opinion of the court, said: "He cannot be allowed to make a statute of limitations so short as to be capable of becoming a means of fraud. Thirty days might elapse before the consignee became aware that anything had been consigned to him, especially if he was absent from home." In *Caphart v. Seaboard etc. R. R. Co.*, 81 N. C. 438, 31 Am. Rep. 505, a stipulation in a bill of lading given by a common carrier, that in case any claim for damage should arise for the loss of articles mentioned in the receipt, while in transit, or before delivery, the extent of such damage or loss should be adjusted before removal from the station, and claim therefor made in thirty days to a "trace agent" of the carrier, was held to be unreasonable, and therefore invalid. But see *Southern Express Co. v. Hunnicutt*, 54 Miss. 566, 28 Am. Rep. 365, where it was held that a stipulation in an express company's receipt that the company would not be liable for any loss, unless written claim therefor should be made at the shipping-office within thirty days from that date, was reasonable and valid. In *Louisville etc. R. R. Co. v. Oden*, 80 Ala. 38, a stipulation in a bill of lading that the company should be liable only as a warehouseman after the arrival of the freight at the point of destination, and that the consignee should receive and take it away as soon as it was ready, without providing for notice to the consignee when it was ready for him, was held to be unjust and unreasonable. In *Missouri Pacific R'y Co. v. Cornwall*, 70 Tex. 611, it was decided that a special contract by which the railway company attempted to exempt itself from liability for injury to cattle delivered to it for transportation, except such as might result from the willful negligence of the company, could not be enforced. And a stipulation in a contract that, as a condition precedent to the shipper's recovery for injury to cattle, he should give notice in writing of his claim to the officers of the company, or its nearest station-agent, before the cattle were removed from their place of destination, and before they mingled with other stock, is not reasonable, unless the company is shown to have had an officer or agent to whom such notice could be given: *Missouri Pacific R'y Co. v.*

Harris, 67 Tex. 166; *Smitha v. Louisville etc. R. R. Co.*, 86 Tenn. 198. A stipulation requiring a claim for loss to be presented within sixty days from the date of the contract, without reference to the time of the loss, is unreasonable and void: *Pacific Express Co. v. Darnell*, Sup. Ct. Tex., Nov., 1887. A stipulation by which a person sent by the shipper to care for his stock is to be considered as an employee of the railway company is not valid: *Missouri Pacific R'y Co. v. Ivy*, 71 Tex. 409; 10 Am. St. Rep. 758. In that case, Collard, J., delivering the opinion of the court, said: "By the agreement indorsed on the back of the contract, he agrees that he is the employee of the company; but that is evidently a fiction to provide for the release of the company from damages for personal injuries occasioned by the negligence of its servants. It is a pretense, a subterfuge, upon which to predicate the discharge of the company for damages in a plausible form. The true relations of the parties cannot be changed by such an agreement. It states a fact which is untrue; the agreement that it is true does not make it so."

A stipulation in a contract with a common carrier assenting to the conveyance of the goods at the convenience of the company is unreasonable, and will not be permitted to protect it from liability for an unreasonable detention of the goods in its warehouse: *Branch v. Wilmington etc. R. R. Co.*, 88 N. C. 573. A stipulation which requires a shipper of stock to make his claim for loss before unloading them is unreasonable and void: *Ormsby v. Union Pacific R'y Co.*, 2 McCrary, 48. A stipulation that a claim for loss of goods must be made at the time they are delivered will not protect the company, if claim be made within a reasonable time after the loss is ascertained: *Memphis etc. R. R. Co. v. Holloway*, 9 Baxt. 188; see also *Rice v. Kansas etc. R'y Co.*, 63 Mo. 314. An agreement discharging a common carrier from his liability as such cannot avail to divest him of his real character, nor indirectly relieve him from responsibilities from which he cannot directly, by contract, free himself: *Moulton v. St. Paul etc. R'y Co.*, 31 Minn. 85; 47 Am. Rep. 781.

In England, by the railway and canal traffic act of 1854, 17 & 18 Vict., c. 31, it is left to the court to determine whether a special contract limiting the carrier's liability is just and reasonable or not: *London etc. R'y Co. v. Dunham*, 18 Com. B. 826. Under this act it is held that a stipulation exempting the carrier from all liability, or from liability in any case, is unreasonable and void: *Gregory v. West Midland R'y Co.*, 2 Hurl. & C. 944; *Lloyd v. Waterford etc. R'y Co.*, 15 L. R. C. L. 37; *Ashendon v. London etc. R'y Co.*, L. R. 5 Ex. D. 190. And so is a condition or stipulation not to be liable for damage from overcarriage, detention, or delay, however caused: *Alday v. Great Western R'y Co.*, 5 Best & S. 903; *Kirby v. Great Western R'y Co.*, 18 L. T., N. S., 658. A stipulation that the shipper shall assume all risk from negligence, default, or defects in the station or cars is also held to be unjust and unreasonable: *Rooth v. North Eastern R'y Co.*, L. R. 2 Ex. 173. So, also, is a stipulation by which the shipper undertakes to assume all risks of conveyance, loading, and unloading: *McManus v. Lancashire etc. R'y Co.*, 4 Hurl. & N. 327. A condition which exempts the company from liability for all loss, detention, or damage to any package insufficiently or improperly packed, marked, directed, or described, is held to be unjust and unreasonable, both at common law and under the statute: *Garton v. Bristol etc. R'y Co.*, 1 Best & S. 112. And a condition requiring a shipper to bring his goods to the station at an unreasonable time is unjust and unreasonable, and will not relieve the company from liability for refusing to receive them: *Simons v. Great Western R'y Co.*, 18 Com. B. 805.

In the case of *Peck v. North Staffordshire R'y Co.*, 10 H. L. Cas. 473, it was

held that a stipulation requiring the shipper of marble chimney-pieces to insure them at the rate of ten per cent on their declared value was unreasonable and void. In the case of *Doolan v. Directors of Midland R'y Co.*, L. R. 2 App. Cas. 792, a railway company made contracts to carry animals from an Irish port to a town in England on through-tickets which contained this condition: "That with respect to any animals, etc., booked through partly by railway and partly by sea, such animals will only be so conveyed on the condition that the company shall be exempt from any liability for any loss or damage which may arise during the carriage of such animals, etc., by sea, from the act of God, etc., accidents from machinery, etc., and all and every other damages and accidents of navigation of whatever nature, in the same manner as if the company had signed and delivered to the consignor a bill of lading containing such condition." This condition was held to be unreasonable and void. In *Dickson v. Great Western R'y Co.*, L. R. 18 Q. B. Div. 176, a stipulation in the company's contract provided that the company would not be a common carrier of dogs, nor receive them for conveyance, except on the condition that it should not be responsible for any amount beyond two pounds, unless a higher value was declared at the time of delivery, and five per cent paid on the excess of value over the two pounds. It was held that although the company was not bound to become a common carrier of dogs, yet being bound by the railway and canal traffic act of 1854 to afford reasonable facilities for the carriage of dogs, it could only limit its liability by reasonable conditions; and that as this condition was not reasonable, it was void, and did not bind the shipper. The plaintiff recovered twenty-five pounds for damage to his dog.

From the foregoing American and English cases it will be seen that stipulations extorted by railway companies from shippers will not be enforced if they are unjust and unreasonable. But it is well settled, both in this country and in England, that a common carrier may, by express contract fairly entered into, and whose conditions are just and reasonable, protect himself from liability for all loss and damage which does not arise from his own negligence, or that of his agents or servants.

FLOYD v. PATTERSON.

[72 TEXAS, 202.]

CONTRACT FOR FUTURE DELIVERY OF STOCKS, PRODUCE, OR OTHER MERCHANDISE in which an actual delivery is not contemplated, but only a payment of the difference between the contract price and the value of the article at the time agreed upon as the date of delivery, is a mere wagering contract, which will not support an action. But if the transaction has been completed, and another collateral thereto grows out of it, founded upon a new consideration, the new contract is not vitiated by the taint of the old one, and may be enforced.

AGENT WHO HAS RECEIVED MONEY GROWING OUT OF ILLEGAL CONTRACT may be compelled to pay it over at the suit of his principal. The law implies a promise on the part of the agent to pay over to his principal money received for him as such agent, and the illegality of the contract by virtue of which the money was collected affords no defense.

ALTERNATIVE PLEADING, PERMISSIBLE WHEN. — When a suit is against a firm and an individual whose true relation to the firm, either as agent or a member of the firm, is not definitely known to any one but themselves, the plaintiff may allege that such individual was either an agent or a member of the firm, when the liability would be the same either way.

ACTION to recover money received to the plaintiff's use. The opinion states the case.

Clark, Dyer, and Bolinger, for the appellants.

Whitaker and Bonner, for the appellee.

GAINES, A. J. Appellant Leopold was engaged in business in the city of Tyler as a broker in grain and other produce, or as the agent or partner of his co-appellants, who had their principal place of business in Houston, and were either brokers or dealers in such commodities. The principal business was in contracts for the delivery of produce at a future time, in which it was contemplated that the commodities should not be delivered, but only that the profit or loss on the transactions should be paid.

On January 28, 1887, appellee placed an order or made a contract with Leopold, who was purporting to act for Floyd & Co., for the delivery in May of one hundred thousand bushels of wheat. Leopold gave him a slip which read as follows: "Confirmed orders. Tyler, Texas, January 28, 1887. J. Leopold, agent for S. S. Floyd & Co., future brokers in grain, provisions, cotton, and stocks. Bought acc't J. P. Patterson: 100,000 May wheat." (Signed) "J. Leopold."

One thousand dollars was paid at the time as a margin, which was increased by additional demands to \$7,000, when the trade was "closed out." There was a net profit to appellee in the transaction of \$625. Floyd & Co. transmitted the sum of \$7,625 to Leopold to be paid in settlement of the transaction. He paid appellee a small part of the sum due him, leaving a balance still due of \$6,762.

Appellee brought this suit against appellants jointly to recover this sum, alleging that Leopold was the agent and also the partner of Floyd & Co. in the transaction, and that in the deal Floyd & Co. acted as brokers, and as such had received of their principals the sum sued for in satisfaction of plaintiff's demand. The defendants denied the agency and also the partnership, and also that Floyd & Co. acted for any third party in the transaction or received any money from any third party on plaintiff's account. The plaintiff obtained a verdict

and judgment for the full amount of his demand against all the defendants.

We will proceed to the consideration of the main question in the case. This is presented by appellant's assignment of error that the verdict of the jury is contrary to the evidence, "for the reason that the evidence, without contradiction or conflict, shows that the contract which the plaintiff is seeking to enforce in this action was a wager or gambling contract," etc. According to the testimony the original transaction is clearly such as has been denounced by this court as being contrary to public policy, and therefore such as cannot be enforced: *Seeligson v. Lewis and Williams*, 65 Tex. 215; 57 Am. Rep. 593. Counsel for appellee concede the proposition that the original contract will not support an action, but maintain that Floyd & Co. were merely acting as brokers in the transaction.

It is well settled that a contract for the future delivery of stocks, produce, or other merchandise in which an actual delivery is not contemplated, but only a payment of the difference between the contract price and the value of the article at the time agreed upon as the date of delivery, is a mere wagering contract, which will not support an action. But if the transaction has been completed, and another grows out of it collateral to it, dependent upon a new consideration, the new contract is not vitiated by the taint of the old one, and will be enforced. "It has been observed that the test whether a demand connected with an illegal act can be enforced is, whether the plaintiff requires any aid from the illegal transaction to establish his case": *Gilliam v. Brown*, 43 Miss. 641; citing *Simpson v. Blass*, 2 Taunt. 246; *Roby v. West*, 4 N. H. 290; 17 Am. Dec. 423. It is accordingly held that when one as agent of another has received money growing out of an illegal contract he can be made to pay it over at the suit of his principal. In the case above cited (*Gilliam v. Brown*), the testator of the defendant, as the agent of the plaintiff, took the latter's cotton to Memphis during the war and sold it there, as was conceded, in violation of law, and received the proceeds. The plaintiff was held entitled to recover. In *Beetson v. Beetson*, L. R. 1 Ex. D. 13, "the court held that the plaintiff could recover on a check given by the defendant to plaintiff for moneys received by defendant for winnings on bets made by defendant with third persons as agent of plaintiff."

In *Owen v. Davis*, 1 Bail. 315, the defendant received a note

in settlement of the joint winnings of plaintiff and himself at cards. He transferred the note in payment of a gambling debt of his own to a third party, who received payment of the maker at a discount. The plaintiff was held entitled to recover one half of the amount which was actually paid by the maker of the note. In these cases, and in many similar ones which need not be cited, it is held that the cause of action is not dependent upon the illegal transaction. When the plaintiff shows that the defendant has received of a third party money for his use, the law from the naked fact implying a promise, the case is made out without going into the illegal transaction, and the defendant will not be permitted to set up the illegality of the original contract in order to defeat a recovery. So far the rule seems to be generally concurred in, and the principle of the rule is intelligible. There are authorities, even some in our own state, which go further, but we need not discuss them. Counsel for appellee seek to bring this case under the rule of decision laid down in the cases last cited, and the question presents itself, whether there is sufficient evidence in the record before us to warrant the jury in finding that a case existed in which Floyd & Co. upon the close of the transaction received any money for the use and benefit of appellee. Harris, who was a member of the firm of Floyd & Co., testified that as to the dealings in futures that firm were not brokers, but were dealing on their own account. In other words, his testimony was positively and distinctly to the effect that when Floyd & Co. accepted an order or contract for future delivery they accepted it for themselves as principals, and not as agents of another. He also testified that in the particular transaction in question in this suit Floyd & Co. dealt upon their own account. The testimony of Leopold is substantially to the same effect.

We have failed to find anything in the record which is in conflict with this evidence. The testimony of appellee does not show that he knew any one in the transaction except Leopold and Floyd & Co. Neither does that of his silent partner in the contract. There is strong evidence tending to show that Floyd & Co. were held out as brokers. Perhaps the verdict should be held conclusive upon that question for the reason that, as we think, there was sufficient evidence to warrant the jury in finding that Floyd & Co. are estopped to deny the agency of Leopold, and in the contract signed by him they are named as brokers.

But appellee's case does not rest upon the fact that Floyd & Co. permitted themselves to be held out as brokers, or were in fact such. His case is not maintainable against Floyd & Co. by proof that they were acting for third parties, or that they are estopped to deny that fact, but he must show that, as a matter of fact, in a settlement of his contract, Floyd & Co. received of some third party for his use the sum of money which he seeks to recover. There is no proof whatever of the intervention of any third party in this transaction, or that any money was ever paid to Floyd & Co. for plaintiff on its account. The payment of money to them for his use is the gist of the only action he can maintain against Floyd & Co. growing out of the contract disclosed by the evidence. The evidence shows that the money which was coming to plaintiff under the contract was sent by Floyd & Co. to Leopold, but there is no testimony showing that the money was paid to Floyd & Co. for plaintiff by any one. This latter was an affirmative fact, which it was incumbent upon plaintiff to prove in order to maintain his suit against that firm. The mere fact that they may have been held out as brokers, and may ostensibly have contracted as brokers, does not prove that in this particular transaction they had a principal, and that such principal paid them the money for plaintiff. We conclude that the verdict of the jury as to Floyd & Co. is not supported by the evidence, and that therefore the judgment must be reversed.

What we have said as to the verdict against Floyd & Co. does not apply to that against Leopold. It is shown that Floyd & Co. placed the money in his hands, if not for the benefit of plaintiff by name, at least in settlement of his contract. The principles we have already announced we think sufficient to show that the illegality of the transaction does not stand in the way of plaintiff recovering a judgment against him. But the reversal of the judgment as to Floyd & Co. reverses it as to him.

We are of the opinion that the exceptions to the petition on the ground of the misjoinder of parties and of multifariousness were not well taken. If the plaintiff had shown, as he alleged, that Floyd & Co. had received the sum of money sued for from some third party on account of plaintiff, and that they had remitted it to Leopold, and that he had failed to pay it over, he would have shown a cause of action both against Leopold and the company; and since both causes of action grew out of the same transaction, they could be joined

in the same suit. We also think that our system of pleading permits a plaintiff who is doubtful about the particular facts which he can establish to plead in the alternative, without rendering his pleading demurrable for inconsistency or multifariousness. The testimony in this case shows that the exact relations between the defendants existing at the time the cause of action arose were not definitely known to any one but themselves, and serves to illustrate the necessity which frequently exists of permitting alternative allegations. Whether, under a given state of facts, one is to be considered as the agent or partner of another is often difficult to determine; and in such a case, it is peculiarly proper to permit a party to allege that he is either the one or the other, when the liability would be the same either way.

The judgment is reversed, and the cause remanded.

WAGERING CONTRACTS. — Contracts to deal in futures or margins, their validity, and the enforcement of the relations growing out of: *Note to Clark v. Brown*, 4 Am. St. Rep. 101; *Crawford v. Spencer*, 92 Mo. 498; 1 Am. St. Rep. 745, and extended note 752-766; *Sondheim v. Gilbert*, 117 Ind. 71; 10 Am. St. Rep. 23, and cases in note 23, 24.

AGENCY. — Money won on futures in grain gambling cannot be recovered from an agent who won it for his principal with the use of the latter's money, although money put into an agent's hands may be recovered when no part of it has been won as profits in an illegal venture: *Clark v. Brown*, 77 Ga. 606; 4 Am. St. Rep. 98; compare *McGrew v. City Produce Exchange*, 85 Tenn. 572; 4 Am. St. Rep. 771, and note.

PRINCIPAL AND AGENT. — Where an agent collects money for his principal upon an executed illegal transaction, the principal may recover it by action for money had and received: *O'Bryan v. Fitzgerald*, 48 Ark. 487.

WEAVER v. NUGENT.

[72 TEXAS, 272.]

JURISDICTION OF SUIT TO SET ASIDE SHERIFF'S SALE OF LAND. — A justice's court has not jurisdiction of a suit brought to set aside a sheriff's sale of land made under an execution issued on a judgment rendered in a justice's court. The district court is the proper court in which to bring such suit.

TENDER OF PURCHASE-MONEY IN SUIT TO ANNUL SHERIFF'S SALE. — A tender of the purchase-money by a defendant in execution, in a suit brought by him to set aside a sheriff's sale of land under the execution, obviates the necessity of making the state a party to such suit.

RULING UPON ISSUES WITHDRAWN FROM JURY. — A ruling upon a matter which was withdrawn from the jury in the charge is not ground for reversal of the judgment.

TENDER, WHAT SUFFICIENT. — A tender of money made in the pleadings, followed by a payment thereof into court, is a sufficient tender.

SALE MADE BY VENDOR FOR PURPOSE OF PAYING HIS DEBTS IS NOT FRAUDULENT; and where there is testimony tending to show that it was made for that purpose, the defendant has the right to have the jury pass upon the testimony on that issue.

INADEQUACY OF PRICE AT JUDICIAL SALE DUE TO ACT OF DEFENDANT IN EXECUTION. — Inadequacy of price at a judicial sale, caused by any act done by the defendant in execution, or by his direction or authority, is not ground for setting aside the sale. To justify the setting aside of the sale, it must be shown that there were irregularities, and that they tended to cause the inadequacy, and were not caused by the defendant.

ACQUISITION OF NEW HOMESTEAD IS ABANDONMENT OF OLD ONE, and whether the new homestead is one or not is to be determined by the questions, Is it the residence of the family, and is it the intention to occupy it as the home of the family? It is not error, therefore, to refuse a charge that the claimant of a homestead exemption should show an abandonment of a former homestead in order to establish the exemption claimed.

NEGOTIABLE PROMISSORY NOTE IS VALUABLE CONSIDERATION in a sale of land.

DEFECT IN CHARGE TO JURY IS NOT GROUND FOR REVERSAL of the judgment, where the defect is not called to the attention of the court by an instruction supplying it.

PLEADING NEED NOT ALLEGE WHAT COURT IS PRESUMED TO KNOW.

PROPER PARTIES IN SUIT TO AVOID JUDICIAL SALE OF LAND. — Where land sold under execution for a nominal price had been previously conveyed by the defendant in execution by warranty deed to a purchaser, who gave his promissory note for the purchase price thereof, whether the conveyance was fraudulent or *bona fide*, such defendant has an interest in the land, which, if injured by such execution sale, he has a right to protect, in a suit brought by the plaintiff in execution to recover the land.

PROCEEDINGS AT JUDICIAL SALE MUST BE AT LEAST REGULAR in order to pass title, when there is practically no consideration.

TRESPASS to try title. The opinion states the case.

Sims and Wright, for the appellant.

Chambers and Doak, and G. F. Burdett, for the appellees.

WALKER, A. J. September 21, 1886, appellant brought an action of trespass to try title against Emmett Nugent, Eliza Griffith (married, while suit was pending, to Higgins), and Miss Comma Nugent (married to Garen), for certain lands described in the petition.

Defendants pleaded not guilty, and as to the land which had been levied on and sold to the plaintiff as the property of Comma Nugent, that it was exempt from execution as the homestead of herself and the defendant Emmett, they owning an undivided interest in a tract of land which had been allotted to their mother during her life, and to certain of her children

at her death; that the mother was dead, and the land had been occupied subsequently by them as their home, neither being married.

The defendant Eliza Griffith alleged that the lots 14 and 15, of 34.53 each, was part of her homestead, she residing on a two-acre lot near, she being a widow with a minor son. The sale was made August 3, 1886.

The defendants further alleged that no demand had been made upon the said Mrs. Griffith or Miss Comma Nugent for money or for a levy; that the levy was made for the purpose of breaking them up; that the property levied on was reasonably worth \$6,450, and the judgment \$350; that the lands were sold at execution sale, and bought by the plaintiff at \$10, a grossly inadequate price, being about one fifth of one per cent of its value; tender was made March 31, 1887, and the money was brought into court; that the knowledge of the sale was designedly kept from the defendants, who did not know of the levy or sale when made, etc.

In supplemental answer defendants alleged that they, the said Mrs. Griffith and Miss Comma Nugent, had not sold the land to their brother, the co-defendant in this suit, in fraud, etc.

Other allegations were made, which will be noticed hereafter.

The testimony showed that a judgment upon a forfeited bail bond had been rendered in a justice's court against the defendants Mrs. Griffith and Miss Comma Nugent, as sureties for their brother; that execution issued thereon, and came to the hands of the deputy sheriff July 9, 1886; that the deputy sheriff never called upon the defendants for the money or for a levy, nor was any levy pointed out by the county attorney, but he obtained the description of the lands from the county records; that defendants did not know of the issuance of the execution, levy, or sale until after the sale, which was made August 3d; that they had some fifty or sixty dollars of personal property liable to execution. It further appeared that the defendants had executed warranty deeds for the lands levied upon to the defendant Emmett Nugent, a minor, then wanting a few weeks of majority; that his negotiable promissory notes had been executed in payment, and that Emmett Nugent, after his majority, retained the land, renting it and receiving rents. These deeds were on record before the levy was made. At the sale, notice of his claim was made by an attorney representing him. No one was present representing the county or state. It was shown that the lands were worth

from three thousand to six thousand dollars, and that plaintiff bought them for ten dollars. The attorney who bought for plaintiff made out the sheriff's return at the sheriff's dictation, as testified to by him.

The court charged upon the issues made in the pleadings and testimony. Many instructions were asked by the defendants. A verdict was rendered for the defendants for the land, and for the plaintiff for the ten dollars deposited. Judgment was accordingly, and for plaintiff for costs of suit. The plaintiff appeals, and asks revision of the rulings of the court upon the pleadings of defendants, and the charge of the court, and the refusal of instructions asked by the plaintiff, as well also of the verdict as not supported by the testimony.

The first assignment is not well taken. The purpose of the pleadings of the defendants attacked was to avoid the sheriff's sale. The sale was made August 3, deed made August 31, suit filed September 21, 1886, by the purchaser at the sale for the land. The judgment under which the execution was issued, and under which the sale was made, was rendered in a justice's court. That court does not have jurisdiction, where the title to the land is put in litigation, to hear and determine the questions. The tender of the purchase-money obviates the necessity of the presence of the state as a party nominal plaintiff in execution. This is in accordance with the decision in *Miller v. Koertge*, 70 Tex. 162; 8 Am. St. Rep. 587.

The ruling of the court upon the exceptions to so much of the answer as pleaded the homestead exemption was not important, taken in connection with the subsequent proceedings. The court in its charge informed the jury that to the extent of the interest of one fourth of the tract No. 1 sold as the property of defendant Mrs. Garen (*née* Miss Comma Nugent) such claim was not sufficient to exempt it from the sale. The allegations as to the lots 14 and 15, claimed by Mrs. Griffith, were sufficient, and to that extent the exceptions were not well taken. The actual residence upon the lot No. 2, and the cultivation of lots 14 and 15 by tenants, in connection with the residence lot and claim of it as homestead, she being a widow with a minor child, were sufficient facts to constitute a homestead exempt from execution.

The ruling upon the alleged acts of the county attorney was immaterial, but the charge eliminated all the testimony on that subject from the case submitted to the jury.

That specific acts of fraud are necessary when a transaction

is attacked as fraudulent is well recognized. The verdict was based upon another branch of the case, and on that account the ruling of the court questioned in the fourth assignment was not important.

The tender of the purchase-money made in the pleadings of defendants, followed by the payment into court of the money bid at the sale, and paid by the plaintiff, was sufficient as a tender: *Spann v. Sterns*, 18 Tex. 562.

The proposition in the first charge asked by the plaintiff, and refused, "if Emmett Nugent, knowing of the judgment against his sisters, his vendors, and that it was unsatisfied, and that the purchase left his sisters insolvent, such sale would be fraud as matter of law," is not correct as applied to the testimony. If the sale was made as testified by both his vendors for the purpose of paying their debts, it was not fraudulent. The defendants had the right to have the jury pass upon the testimony upon that issue as in the others.

The second and third instructions asked by the plaintiff did not distinguish the acts of the defendants in the execution from those of Emmett Nugent and Stephens. These latter were present or represented at the sheriff sale, and the acts referred to in these instructions might have applied to them, but not to the two sisters, who were neither present nor represented at the sale. Besides, the substance of the two charges had already been given in the general instructions given by the court. The jury were told that if the "inadequacy was caused by any act done by defendants, or by their direction or authority, the same would not be ground for setting aside the sale," and that the irregularities must be shown, and that they tended to cause the inadequacy, and were not caused by the defendants.

The refused charge No. 4, to effect that Mrs. Griffith could not have the benefit of the homestead exemption upon the lots 14 and 15 until total abandonment of her former homestead was proved, was directing the attention of the jury to an issue not in the pleadings, and was upon the weight or effect to be given to certain parts of the testimony upon the issue.

When a homestead is left, and another is acquired, the acquisition of the new is an abandonment of the old: *Slavin v. Wheeler*, 61 Tex. 654. Whether the new homestead be one is to be determined by the questions, Is it the residence of the family, and the intent to occupy it as the home of the family?

Besides, as the jury found for the defendants upon another issue, the refusal worked no harm to plaintiff.

It is insisted that, upon the uncontradicted testimony of the three defendants, the court should have held the sale from the defendants in the execution to Emmett Nugent fraudulent, and should not have submitted the issue to the jury. Fraud is a fact to be proved. It was the duty of the court to instruct the jury upon the subject, giving the law upon the issue, and no more. It could not deprive the defendants of the right of a jury trial, in whole or in part, where facts evidenced by parol testimony were to be passed upon. The defendants distinctly affirmed the honesty, and therefore the validity, of the sale, and it was for the jury to find if the facts contradicted the oral testimony.

It was not error for the court to charge the jury that a negotiable promissory note was a valuable consideration: *Cameron v. Romele*, 53 Tex. 238; *Case v. Jennings*, 17 Id. 673. Besides, the insolvency of the maker of the notes was not proved. The minor ratifying his act after majority is bound by it.

Complaint is made that the court did not instruct the jury as to what irregularities were when the jury was charged as to the effect of irregularities in the proceedings before and at the sale in the acts of the officers, etc., coupled with inadequacy in the price paid. This was a defect, and if it had been called to the attention of the court by an instruction supplying it, such explanation should have been given: *Miller v. Koertge*, 70 Tex. 162; 8 Am. Rep. 587. The charge was not erroneous in terms, but deficient in fullness. It has been repeatedly held that a defective charge of itself is not ground for reversal.

The complaint that it was error to submit the question of the homestead claim of Mrs. Griffith to the lots 14 and 15 is not sustained. She testified to facts, which, if believed, constituted the property her homestead.

It is complained that the answer contains no distinct allegation connecting the alleged inadequacy of price with the alleged irregularities as caused thereby. But exceptions were not urged to this defect. Both were alleged in the answer, and testimony was introduced to sustain them. The natural connection can probably be presumed. It is not necessary to allege what the court would be presumed to know: *T. & P. Ry Co. v. Curry*, 64 Tex. 88.

The defendants in the execution had an interest in the sale.

Their conveyances were with general warranty. Some interest in the lands would exist whether these sales to Emmett Nugent were fraudulent or honest. Holding the purchase-money notes, they had a claim upon or interest in the lands which would be affected by the sale. If their conveyances were *bona fide*, the title in their vendees would not be affected, but the litigation likely to arise upon the execution sale ordinarily would result in delaying the payment of the purchase-money. If the sales were not in good faith, they would be interested in the land discharging the judgment.

It is not shown that these women knew of the sale until after it was made. They did not know of the levy. They had some personal property subject to execution which reasonably would have brought several times as much money as was realized upon the sale of the land. They had the purchase-money notes; a basis of credit upon which they could have raised the money to pay the execution had they been called upon. If their testimony was true, that they sold the land to get means to pay their debts, it is reasonable that they might have utilized these notes in some way to raise money to satisfy the judgment. Execution had been withheld for a time by order of the county attorney. "He did not attend the sale, or authorize any one else to do so for the county. . . . He preferred holding the judgment to involving the county in a lawsuit for the land." The levy was not made at the instance of the county attorney, who controlled the judgment and the execution. The deputy sheriff into whose hands the execution came took entire charge of the matter. He did not call upon the defendants for the money or for a levy; he might have known of the existence of some personal property subject to the execution. He obtained the description of the lands from the county records. He received the execution July 9th, and made the sale August 3d. In all subsequent proceedings the deputy sheriff followed the law. The lands were worth from three thousand to six thousand dollars and were sold for ten dollars.

The inadequacy of the price, being from one fifth to one third of one per cent of the value of the land, is so great that it can be considered but nominal, not actual. No one but the purchaser and the officers to whom costs were owing could be benefited. The means of satisfying the judgment were destroyed to defendants and lost to the county, so far as the proceedings took effect.

It is well settled that "as to the failure of the sheriff to demand a levy of the defendant in execution before proceeding to sell the land, the statute on the subject is directory, and that the failure to comply with its requirements would not necessarily render the sale void": *Odle v. Frost*, 59 Tex. 689. So in *Donnebaum v. Tinsley*, 54 Id. 366. "Mere irregularities of this sort do not affect the title of the purchaser who is not connected with them." This was in a case where there was no proof that the land did not sell for an adequate price, the value not being in proof.

In *Taul v. Wright*, 45 Tex. 394, is given the views of Justice Moore on the effect of irregularities when accompanied by inadequacy of price. "If the judgment is valid, though it may be impossible to determine the precise limit at which mere inadequacy in price alone will authorize the setting aside of a judicial sale, still it cannot be denied that there may be cases in which the price paid is so utterly insignificant and shockingly disproportionate to the value of the property that a court of equity cannot regard it as in conscience any consideration whatever, and the mere fact of attempting to hold the property so purchased will be held conclusive evidence of fraud. Certainly, when there is an enormous inadequacy of price at sheriff's sale, if there are but slight irregularities or other circumstances attending it calculated to prevent the property from bringing something like its reasonable value, it is regarded as unconscientious in the purchaser to hold the property so purchased, and his deed will be canceled": See also *Freeman on Executions*, sec. 309, and cases cited.

Where, as in this case, there is a practical confiscation of the property under the guise of an execution sale, it is likely the jury would scrutinize the testimony in an effort to account for the cause of such a sacrifice. Naturally, before allowing the plaintiff to hold the property without the payment of more than a nominal consideration, they would, under the charge, consider all the circumstances preceding and at the sale, the fact that no levy was pointed out by the county attorney, the haste in making the levy, the failure to demand payment or a levy, the fact that the defendants in execution did have some personal property in the county liable to seizure (much more than enough to satisfy the costs), the ignorance of the defendants in execution interested in the sale of the levy and of the sale; and the jury might reasonably have been satisfied, notwithstanding the deeds by the defendants in execution to their

brother, that the gross inadequacy or absence of more than a nominal price was to a great extent occasioned by the irregularities. It may even be held that in such a case the party holding should show an exact compliance with the law; that is, not deciding that the mere assertion of the claim is unconscientious, we hold that where there is practically no consideration the proceedings must at least be regular in order to pass title. The verdict was upon this issue. Plaintiff recovered his purchase-money and costs of suit, and the sale was annulled.

Finding no error, the judgment will be affirmed.

JURISDICTION TO SET ASIDE A SHERIFF'S SALE.—In order to set aside a sheriff's sale for irregularity or inadequacy of consideration, a direct proceeding should be instituted for that purpose in the court from which the execution issued: *Miller v. Koertge*, 70 Tex. 162; 8 Am. St. Rep. 587.

JUSTICE OF THE PEACE COURT—JURISDICTION WITH RESPECT TO REAL ESTATE.—Whenever it appears upon the trial of a case before a justice of the peace that the title to real estate is involved, the action must be dismissed for want of jurisdiction: *Edwards v. Cowper*, 99 N. C. 421; *Rodley v. O'Leary*, 36 Minn. 173; compare *Lyman v. Stanton*, 39 Kan. 443; *Lyman v. Stanton*, 40 Kan. 727.

TENDER.—As to the effect of a plea of tender, see extended note to *Meynahan v. Moore*, 77 Am. Dec. 470-491; *Davis v. Millaudon*, 17 La. Ann. 97; 87 Am. Dec. 517, and note. A plea of tender is sufficient, though the money is not brought into court: *Loughborough v. McNevin*, 74 Cal. 250; 5 Am. St. Rep. 435; compare *Supply Ditch Co. v. Elliot*, 10 Col. 327; 3 Am. St. Rep. 586; *Polk v. Mitchell*, 85 Tenn. 634.

EXECUTION SALES.—INADEQUACY OF CONSIDERATION as a ground for annulling an execution sale: Note to *Miller v. Koertge*, 8 Am. St. Rep. 592. Mere inadequacy of price is not sufficient to set aside a sheriff's sale: *Gordon v. O'Neil*, 96 Mo. 350; but is a good ground for refusing to confirm a sale: *Branch v. Griffin*, 99 N. C. 173. But where there is a gross inadequacy of price, the proceedings of a sheriff must be free from irregularities: *Gordon v. O'Neil*, 96 Mo. 350; compare *Blum v. Rogers*, 71 Tex. 668; although, as a general rule, even gross inadequacy of price alone is not sufficient to avoid an execution sale: *Peterson v. Little*, 74 Iowa, 223. While no test of adequacy applies to all cases, courts are not prone to refuse to confirm a sale for mere inadequacy of consideration, yet where the inadequacy is so gross as to amount to a sacrifice of the property, no confirmation can be had: *Coles v. Coles*, 83 Va. 525. In Kansas the sheriff must sell for at least two thirds of the appraised value: *De Jarnette v. Varner*, 40 Kan. 224. In sales of realty by the register, the purchaser is entitled to have the sales confirmed when the price is measurably adequate, although at a resale a larger sum is offered: *Glennon v. Mittenight*, 86 Ala. 455.

ABANDONMENT OF HOMESTEAD.—Removal from a homestead, and the acquisition of a new home, is a forfeiture of the old homestead right: *Wright v. Dunning*, 46 Ill. 271; 92 Am. Dec. 257; note to *Gibson v. Mulligan*, 67 Am. Dec. 249; *Kaes v. Gross*, 92 Mo. 647; 1 Am. St. Rep. 767. But the mere

removal from a homestead for even a period of six months does not operate as an abandonment thereof: *Russell v. Speedy*, 38 Minn. 303; nor does the removal of a husband and his wife from premises occupied as a homestead after a conveyance by the husband, the wife not having joined in the deed, operate to defeat the wife's homestead right, provided no new homestead is acquired after their removal: *Collins v. Boyett*, 87 Tenn. 334.

DIXON v. SANDERSON.

[72 TEXAS, 359.]

LOTTERY PRIZE DRAWN BY WIFE, COMMUNITY PROPERTY WHEN. — A prize drawn on a lottery ticket bought by a wife with her separate money is not acquired by gift, devise, or descent, and is not therefore her separate property, but the common property of the husband and wife.

GIFT BY HUSBAND TO WIFE OF LOTTERY PRIZE, VALIDITY OF. — If at the time a wife purchases a lottery ticket her husband agrees that whatever prize may be drawn thereon shall be her separate property, and the money, when drawn, is placed in bank in her name as her separate property, these facts, as between the husband and wife, are sufficient to constitute the money her separate property. But to sustain the validity of such gift as against creditors of the husband, the wife must show that, at the time of the transaction, he had ample means readily and conveniently accessible to his creditors, and to the ordinary process used in the collection of debts; otherwise the conveyance to her will be held fraudulent as against his creditors.

PRACTICE. — The uncontradicted testimony of both husband and wife, that at the time he made a gift to her he had ample means to pay all his debts, is sufficient to sustain the validity of the gift. And where this testimony is taken by deposition, and no effort is made by the opposite party to ascertain by cross-examination what property besides that given by the husband to the wife remained in his hands after the gift, and they apply for a postponement of the trial to enable them to be present at the trial and testify more fully than they had done in the depositions, but their application is refused upon the objection of the opposite party, the latter cannot complain if full effect be given to such uncontroverted testimony.

SUIT to enjoin a sale under execution. The opinion states the case.

Coombes and Gano, and M. B. Templeton, for the appellants.

STAYTON, C. J. This is a suit brought by Mrs. Dixon to enjoin the sale of a house and lots under an execution issued against her husband. She claims, and the evidence is sufficient to show, that some time during her coverture, with one dollar which she had before her marriage, she bought a ticket in the Louisiana State Lottery, on which a prize of fifteen thousand dollars was drawn, and that with a part of this the

lots in controversy were bought, and the improvements thereon made.

It is further shown that the husband agreed at the time the lottery ticket was bought that whatever prize might be received on it should be the separate property of the wife; and that the money so drawn and property bought with it as between the husband and wife have been treated as her separate estate.

The lots were bought on June 13, 1883, and it is not made to appear how long before that time the prize was received. It was proved that there were six judgments rendered against the husband in 1879, aggregating about two thousand five hundred dollars, and that these were settled by compromise in October, 1883.

The husband became indebted to appellee in 1877 in the sum of two hundred dollars, for which note was given due one year after date. This note, after the expiration of nearly five years, was unpaid, when the husband renewed it by another note, which was never paid, but on which appellee secured judgment on April 22, 1885. Under this judgment an execution issued, and was levied on the property in controversy. The purpose of this suit is to restrain a sale under this levy.

Four witnesses who lived in the town of Ennis, where the property seems to be situated, and where Dixon seems formerly to have lived, testified that they had known him since 1875, and that he was then in mercantile business with another person, and failed in the year 1879, since when he has been generally considered insolvent, and without any property subject to execution.

These witnesses, however, stated that they did not know of their own knowledge that Dixon had not property in Dallas County at all times subject to execution.

Dixon and wife both testified that at the time the property in controversy was bought he had ample means to pay all his debts, but neither of them state in what the means consisted, and it appears that the money received as a prize was placed on deposit in a bank in New Orleans in the name of Mrs. Dixon.

On the case thus made the court below dissolved the injunction, and rendered a judgment for the defendant.

If the money with which the lots were bought was the separate property of Mrs. Dixon otherwise than through gift from her husband, there can be no question of her right to an injunction, for the deed upon its face does not show it to be

other than community property, and a sale under execution would cloud her title.

It is insisted that the money received as a prize became the separate property of Mrs. Dixon by reason of the fact that the lottery ticket on which it was drawn was bought with money owned by her in her separate right. The statute declares that "all property acquired by either husband or wife during marriage, except that which is acquired by gift, devise, or descent, shall be deemed the common property of the husband and wife": R. S., sec. 2852.

That the prize came not by gift, devise, or descent is too clear. It came as the fortuitous result of a contract based on valuable consideration paid, and is but the profit on a return which, like other profit not resulting from the increased value of a thing bought with the separate means of one party to the marital union, becomes the common property of the husband and wife.

Property purchased with money the separate property of husband or wife, or taken in exchange for the separate property of either, becomes the separate property of the person whose money purchases or whose property is given in exchange, in the absence of some agreement, express or implied, to the contrary; and if the thing purchased or taken in exchange increases in value, this necessarily inures to the benefit of its owner.

Such a state of fact, however, is not before us; and we are constrained to hold that all profit realized on purchase of the lottery ticket became community property.

As between the husband and wife, the facts are sufficient to show that the money received through the lottery ticket became the property of the latter through the gift of the husband, and the inquiry arises, whether he was in condition lawfully to divert so much of the common property, and thus place it beyond the reach of his creditors.

If the husband had ample means remaining within the reach of his creditors at the time he made the gift to satisfy all their claims, then the gift to his wife was not fraudulent, and ought to be sustained.

There is evidence tending to show that he was considered insolvent, but there was no witness who was able to say that he may not have had, at all times in an adjoining county, property subject to execution sufficient to pay his debts.

So far as shown, he seems to have paid all his debts except

that due appellee, which on April 22, 1885, amounted to less than \$325.

The uncontradicted evidence of both husband and wife is, that when she bought the property in controversy he had ample means to pay all his debts.

The voluntary conveyance of property by one indebted is evidence of fraudulent intent, and the burden of showing that this did not exist rests upon the donor. This may be shown by proof of the fact that the debtor, at the time of the conveyance, had ample means remaining to discharge all his pecuniary liabilities then existing.

If a donor at the time of making a gift be insolvent, his conveyance is void, for its necessary effect is to hinder, delay, or defraud creditors; but the mere fact of indebtedness alone is not sufficient to render a voluntary conveyance void. If, however, looking to the magnitude of the gift, the amount of indebtedness existing, and the value and character of the property left to the donor after making the gift, it does not appear that the assets remaining in the hands of the donor were ample to satisfy all his debts, then the voluntary conveyance ought to be held fraudulent. It should appear, also, that the property remaining in the hands of the donor, even if sufficient to discharge all his debts, was such as was readily and conveniently accessible to his creditors and the ordinary process used in the collection of debts, or a voluntary conveyance ought to be held fraudulent.

In the case before us, the evidence of Dixon and wife was taken by deposition, and there seems to have been no effort made to ascertain by cross-examination what property besides that given by the husband to the wife remained in his hands after the gift.

Under this state of fact more weight ought to be given to the general statement that the husband had ample means to pay his debts than would be given to such statements when inquiry had been made as to what property he possessed, and there was a failure to show this.

It appears from a bill of exceptions that there was some misunderstanding as to the time when the cause would be called for trial, and that when called an application was made for a postponement of the trial in order that the plaintiff and her husband might be present and testify more fully than had they in the depositions which were taken before the amended petition on which the cause was tried was filed.

This evidences the fact that there was no indisposition to state every fact on which the right of the parties might depend, and tends to show a desire to develop the facts more fully than had been done in the depositions.

This opportunity having been refused on the objection of appellee, we are of opinion that he ought not to complain if full effect be given to the uncontroverted statements made by plaintiff and her husband which, so considered, were such as to entitle plaintiff to a judgment.

The judgment of the court below will be reversed, but as there is reason to believe that the case has not been developed as it may be, the cause will be remanded.

It is so ordered.

COMMUNITY PROPERTY. — The presumption attending the possession of property by either spouse is that it belongs to the community: *Morris v. Hastings*, 70 Tex. 26; 8 Am. St. Rep. 570, and note 574; compare *People v. Swalm*, 80 Cal. 46; ante, p. 96, and note 100; *In re Bauer*, 79 Cal. 304.

PROPERTY CONVEYED TO A WIFE, when subject to the satisfaction of the husband's debts: *Driggs v. Norwood*, 50 Ark. 42; 7 Am. St. Rep. 78, and note 83.

BURDEN OF PROOF IN CASES OF FRAUD: Note to *Brown v. Mitchell*, 11 Am. St. Rep. 758.

HUSBAND AND WIFE. — Gift from husband to his wife will, in many cases, be upheld in equity, and the same result follows a gift to the wife from a third person, where the husband assents and treats the property as belonging exclusively to the wife: *Botts v. Gooch*, 97 Mo. 88; 10 Am. St. Rep. 286; *Battle v. Mayo*, 102 N. C. 413; *Richardson v. Hutchins*, 68 Tex. 81. A gift from a husband to his wife must be construed to be for her separate use: *Dugger v. Dugger*, 84 Va. 130; *Miller v. Miller*, 17 Or. 423; *Bolman v. Overall*, 86 Ala. 168.

VOLUNTARY DEEDS, GIFTS, ETC., ARE VOID as to existing creditors, but not as to subsequent creditors, unless actually fraudulent: *Witz v. Osburn*, 83 Va. 227.

EAST LINE AND RED RIVER RAILWAY COMPANY v. CULBERSON.

[72 TEXAS, 375.]

RAILWAY COMPANY NOT LIABLE TO EMPLOYEE OF ITS LESSEE FOR INJURIES RESULTING FROM LATTER'S NEGLIGENCE. — A railway company which has leased its road to another company is not liable to an employee of the lessee company for an injury resulting from its negligence. It is, therefore, error to exclude testimony offered by a railway company defendant in an action against it to recover damages for the death of an employee, that, at the time of the accident, the railroad was not operated or controlled by the defendant company, and that the deceased was not in its service.

AMENDMENT ADDING NEW PARTY AS TO WHOM ACTION IS BARRED. —

Where a judgment is reversed and the cause remanded because a person who should have been made a party plaintiff was not made a party, and after the action is barred as to such person he is made a party plaintiff by amending the petition, and the defendant then demurs to the amended petition on the ground that the action is barred by the statute of limitations, the demurrer should be sustained as to the new party; but the making of the new party does not set up a new cause of action, and the defendant, having pleaded the statute as to such new party, can no longer complain that he is not a party.

BILL OF EXCEPTIONS IN RECORD CANNOT BE CORRECTED IN SUPREME COURT AFTER CAUSE IS SUBMITTED. — If, by any undue practice, the signature of the trial judge is procured to a bill of exceptions which he did not understand, and did not intend to sign, the trial court may, upon motion, even after adjournment for the term, and after the perfecting of an appeal to the supreme court, strike it from the record; and if the amendment be made after the transcript has been filed in the supreme court, the record may be corrected in the latter court by a suggestion of its diminution and a motion for a *certiorari*; but it cannot be corrected in the supreme court in the first instance, especially after the cause has been submitted.

ACTION to recover for injuries causing death. The opinion states the case.

Todd and Hudgins, for the appellant.

Moore and Hart, Sheppard and Thompson, and J. M. Pouns, for the appellee.

GAINES, A. J. W. A. Culberson, while operating a train upon the road of the appellant company as conductor, lost his life in endeavoring to make a coupling between the engine under his control and a train in its front. The appellee, who was his wife, brought this suit on behalf of herself and other beneficiaries to recover damages under the statute for the injury. She alleged that the accident resulted from a defect in the engine, and the incompetence and carelessness of the engineer.

During the progress of the trial the defendant offered to prove by a witness that at the time of the accident the road was not operated or controlled by the defendant company, and that the deceased was not in its service at the time, but was in the employment and acting for the Missouri, Kansas, and Texas Railway Company, another corporation. Upon objection to this testimony by the plaintiff, it was excluded by the court.

There is a plea in abatement in the record, which sets up that the road of the defendant company was leased to the

Missouri, Kansas, and Texas Railroad Company by authority of law; but it was neither sworn to nor insisted upon at the trial, and it must be considered as waived. If, however, the facts justified the conclusion, it was competent for defendant to show under its general denial that although the injury was received upon its road and was actionable, another company was responsible for such injury, and that it was not liable. Did the evidence offered tend to show this? The defendant did not offer in connection with its other testimony to prove that the Missouri, Kansas, and Texas company was operating and controlling its road by authority of any statute, and we think the question must be treated as if no such authority existed.

We have, then, the question of the right of a servant of a railway company operating without authority of statute a road belonging to another corporation to recover of the owner damages for personal injuries resulting to him in the course of his employment through the negligence of his employer or of its officers or agents. This is a new question in this court, and one upon which we have found no direct authority which is at all satisfactory.

This court has held that a railroad company cannot without statutory authority lease its road to another so as to absolve itself of its duties to the public, and that when such lease is made the lessor is liable for an injury to a passenger resulting from the negligence of the lessee: *International etc. R. R. Co. v. Underwood*, 67 Tex. 589; *East Line etc. R'y Co. v. Rushing*, 69 Id. 306. We have also held that in case of an unlawful lease or sale the lessor or vendor is liable to a shipper for the failure of the company operating the road to furnish transportation upon his demand: *Cent. & M. R. R. Co. v. Morris*, 68 Id. 49.

There have been numerous decisions in other states holding the lessor liable, when the lease is unauthorized, for injuries to live-stock and to persons crossing the track caused by the negligence of its lessees. So that it may now be considered the accepted and settled doctrine that in all cases where one railroad company is operating trains upon the road of another without authority of law, the owner of the road remains responsible for the discharge of its duties to the public, and becomes liable for injuries resulting from the lessees' failure to perform their duties. The lessor, by accepting its charter, assumes the obligation to carry passengers safely over its line.

If it intrusts that duty to another company, and a passenger is injured, it is responsible. It binds itself to carry all freight offered to it and to deliver it safely. Should its lessee fail to do this, it is liable. It assumes to operate its road safely and carefully, so as not negligently to destroy or damage property, and not to injure persons who have the right to pass on or near the track. Should its lessee negligently do damage to property, or inflict personal injuries upon wayfarers crossing the road, this is a failure of duty on its part, and it is responsible for the wrong. But the duties which are owed by a railroad company to its servant are not duties owed to him in common with the public, but grow out of the contract of service. He assumes the relation of servant to his employer voluntarily, and out of it arises the reciprocal obligations from one to the other.

It seems to us that the relation of the servant of the company operating the road to the owner is very different from his relation to his employer, and that the relation of the owner of the road to him is different from its relation to the general public. His contract is not with the company owning the road; and it may be asked, Does the latter owe him the duty of a master to his servant, or guarantee that the master with whom he has voluntarily contracted will perform its obligation to him? It may be that if the injury had occurred by reason of a defect in the road-bed or track, and not by reason of a defect in the engine, the company charged with the duty of keeping up the road would be liable. But if it were true that the injury was caused entirely by another company operating the owner's road, and was inflicted upon one of its own employees by reason of a defect in machinery entirely under its control, it is difficult to see upon what principle of policy or justice the lessor should be held liable merely because it owned the road.

In the case proposed to be made by the evidence offered, it seems to us that the liability of the deceased's employer would have been precisely the same on the defendant's road as if the train had been running upon its own at the time of the accident. The act of the Missouri, Kansas, and Texas company in operating the road without a license from the legislature, if such was the fact, was merely illegal in the sense that it was unauthorized, and the object in holding a lessor responsible in such a case is certainly not to impose a mulct or fine by way of punishment. The reason for the rule is the protection of

the public who need the protection. The passenger and the shipper of goods have no option, but must avail themselves of the services of the lessees, whether the lease is authorized or not. The law will not permit the owner of the road to shirk its duty to them by turning over its road to another company. Nor will it permit it to deny its liability when it has allowed such other company, without authority of law, negligently to injure wayfarers over the track or property along the line. There is no privity between the persons injured in such case and the operating company. It is not so with an employee who voluntarily enters the service of the latter company with a knowledge of the facts, and participates knowingly in the wrong, if wrong it be.

Where, in similar cases, a recovery has been permitted against a lessor, it has usually been allowed upon various considerations of public policy: 1. Because the franchises granted are in the nature of a personal trust, and sound policy demands, so far as the general public is concerned, that the corporation receiving the grant should be held responsible for the proper execution of the powers granted; and 2. For the reason that to deny the liability of the lessor would enable a railroad to shirk its responsibility and to injure the public by placing its property under the control of irresponsible parties; and 3. Because a person who had received an injury at the hands of the operating company, and was ignorant of the relations between that company and the owner of the road, might be at a loss to determine against which to bring his action, and thereby placed at a disadvantage in seeking a redress of his wrongs. None of these reasons apply in the case of the servant of a lessee who is injured through the neglect of his employer. He needs no protection as one of the general public, because he can enter the service or not, as he chooses. He is under no compulsion to take employment from an irresponsible company, and he certainly knows whom to sue for a wrong inflicted through his employers' neglect; for the latter is certainly liable to him in such a case. The reason of the rule which holds the lessor liable fails in case of an employee of the lessee, and we think that to follow it in a case like this would be to give it an arbitrary and not a reasonable application.

We conclude that the court erred in excluding the testimony, and for this error the judgment must be reversed.

We do not know what the evidence may disclose upon

another trial as to the relations of defendant corporation and the Missouri, Kansas and Texas company, and it would be futile to attempt to anticipate the questions that may arise. We merely hold now that the evidence offered and excluded tended *prima facie* to show that the defendant was not liable for the alleged injury.

This case was reversed upon a former appeal, because it was then held that the mother of the deceased should have been made a party as an active plaintiff, or as a beneficiary of the recovery. Since the remand of the cause, the petition has been so amended as to bring the suit as well for her benefit as for that of the plaintiff and the children of the deceased. To the amendment petition, which was filed more than twelve months after the death of the deceased, an exception was interposed upon the ground that the cause of action was barred by the statute of limitations. As to the plaintiff and the original beneficiaries, the exception was not well taken. The making a new party did not set up a new cause of action. The exception should, however, have been sustained as to the mother of the deceased. The action was neither brought by her nor for her benefit until twelve months had elapsed from the time her son died. The suit in behalf of the other beneficiaries did not stop the running of the statute against her; but defendant, having pleaded the statute against her, can no longer complain that she is not a party to the action.

We think the other questions raised by the appeal, except in so far as the sufficiency of the evidence to sustain a recovery is concerned, is not likely to arise upon another trial. Since the cause will be remanded, the evidence will not be discussed.

For the errors pointed out, the judgment is reversed, and the cause remanded.

In response to a petition for a rehearing, the following opinion of the court was delivered:—

GAINES, A. J. This is a motion for a rehearing, and is accompanied by affidavits which are intended to impeach a bill of exceptions found in the record. This bill shows the ruling of the court which in the opinion formerly delivered was held to be reversible error. The affidavits tend to show that the bill was improperly allowed and signed by the trial judge. It is not denied that it was allowed, signed, and filed as a part of the record during term time.

We are of opinion that the record cannot be attacked in this way. If by any undue practice the signature of the trial judge should be procured to a bill of exceptions which he did not understand, and which he did not intend to sign, we think it would be competent for the court in which the trial was had, upon a motion made for that purpose, to strike it from the record. This might be done, even after the adjournment for the term, and after an appeal had been perfected to this court. The trial court has the power in a proper proceeding and upon proper proof so to amend its records as to make them speak the truth, even after the jurisdiction has attached in the appellate court. If the amendment be made after the transcript has been filed in the supreme court, the record may be corrected in the latter court by a suggestion of its diminution and a motion for a *certiorari*. It cannot be corrected here in the first instance, and especially after the cause has been submitted. Besides, the affidavit of the trial judge which accompanies this motion shows that at the time he signed the bill of exceptions he knew its contents. If we could disregard the bill, the motion for a rehearing should be granted; but we are of opinion that it must be treated as a proper part of the record in the case.

The question upon which the judgment in this case was reversed was not very fully discussed in the original briefs of counsel, and we have therefore deemed it proper to give it a careful reconsideration. The argument of appellee in support of the motion contains a very full citation of authorities, which have been carefully examined, but which have not changed our former opinion. We think a review of the cases cited will show that none of them are inconsistent with our views as formerly expressed.

Houston etc. R. R. Co. v. Meader, 50 Tex. 85, was a case in which the railroad company was held liable to the owner of land for the trespass of its contractors in entering upon his premises and constructing its road without having first condemned the right of way. The principle decided is, that the act which the contractors were employed to perform being unlawful, so far as the land-owner whose land had not been condemned was concerned, the company could not escape its liability by showing that the persons who committed the trespass were independent contractors to perform the work. The principle does not apply to the question presented in this case.

In *Missouri etc. R'y Co. v. Watts*, 63 Tex. 549, it is said

that the appellee being the servant of the Missouri, Kansas, and Texas Railroad Company, which had leased and was operating the road of the International and Great Northern Railroad Company, the latter company would not be responsible to him for the negligence of the former, provided the lease was authorized by law. It is not decided that the lessor would have been responsible if the lease had not been authorized.

In *West v. St. Louis etc. R. R. Co.*, 63 Ill. 545, it was held that the company was not liable to the servants of its contractors for an injury received through the contractors' negligence.

In *Sawyer v. Rutland etc. R. R. Co.*, 27 Vt. 370, the defendant company had made a contract with another company by which the latter had the privilege of running its trains on the former's road. It was the duty of the defendant to keep a certain switch on its road in order. Through the negligence of its servant, the switch was misplaced, and a locomotive of the other company derailed, the derailment resulting in an injury to the plaintiff, who was a servant of the latter company on duty upon the locomotive at the time of the accident. There the injury was the direct result of the negligence of the servant of the owner of the road, and the plaintiff was held entitled to recover. If, as seems to be contended in the present case, he was to be considered the servant not only of the company who employed him, but also of the owner of the road, then he would have been the fellow-servant of the switchman who caused the injury, and he could not have recovered.

The case of *Merrill v. R. R. Co.*, 54 Vt. 200, virtually reaffirms *Sawyer v. R. R. Co.*, *supra*. There it seems that the defendant company was running on a portion of the road of another company and that this arrangement was authorized by law. It is apparent that the decision does not apply to the case now before us.

Another case cited is *Nugent v. Boston etc. R. R. Co.*, 80 Me. 62; 6 Am. St. Rep. 151. There it is held that "a railroad corporation over a section of whose track another company by virtue of a contract runs its trains is liable in tort to the latter's brakeman who, while in the due performance of his duty on his employer's train, receives a personal injury solely by reason of the negligent construction of the former's station-house." There the injury complained of resulted directly from the negligence of the company owning the road. It was decided that they were charged with the duty of keeping their road in a safe condition for the operation of trains, and that

they were liable to the employee of the operating company for an injury resulting from a failure to perform this duty.

In *Washington etc. R. R. Co. v. Brown*, 17 Wall. 445, the lessor company was held responsible to a passenger on a train of a lessee who was improperly expelled from a car by a servant of the latter. The liability of the owner of the road to passengers on the operating company's train was recognized in the former opinion.

Freeman v Minneapolis etc. R'y Co., 28 Minn. 442, seems to have been an action by a wayfarer for an injury received from the railroad train at a public crossing.

Aycock v. Raleigh etc. R. R. Co., 89 N. C. 321, was an action by the owner of land for damage caused to his timber by fire communicated by sparks from a passing engine.

Balsey v. St. Louis etc. R'y Co., 119 Ill. 68, 59 Am. Rep. 784, involves the same principle as the case last cited.

Nelson v. Vermont etc. Railroad Co., 26 Vt. 717, 62 Am. Dec. 614, was a suit against a corporation owning a railroad for a cow run over and killed by train of its lessee.

The liability which was held to exist in each of the five cases last named is distinctly recognized in the former opinion in the case before us.

The case of *Sellers v. R. R. Co.*, 25 Am. & Eng. R. R. Cas. 451, was brought by the administrator of a servant of the defendant company directly against the company which employed him for injuries which resulted in his death. It throws no light upon the present case.

There are a few other cases cited in the arguments of counsel, but they are upon the same lines and involve the same principles as the case just discussed. None of them are decisions upon the immediate question before us.

These cases commented upon afford ample authority for holding that a railroad company which without authority of law leases its road to another corporation is responsible for the torts of the lessee so far as the general public are concerned. Not one of them sustains the position of appellee, that the lessor is liable to the servant of the lessee for injuries resulting from the negligence of the latter company. We have found only one case in which a servant of the company operating a railroad under a license of the owner was permitted to recover of the latter for the negligence of the former's servants. This is the case of *Macon etc. R. R. Co. v. Mayes*, 49 Ga. 355; 15 Am. Rep. 678. The case presented, however, peculiar con-

cations, and there is another ground upon which the decision might properly have been rested. The immediate question before us was not discussed in the opinion. We are satisfied that no well-considered case can be found which sustains the doctrine contended for by appellee. A few may be found where the servant of the lessee has been permitted to recover of the lessor for injuries resulting from a faulty construction of its track, or from negligence in failing to keep it in repair. But in such a case the injury results from the failure of the lessor to perform its immediate duty.

The argument in support of a motion for a rehearing assumes that we have in our opinion treated the plaintiff's suit as an action *ex contractu*. This is a mistake. The suit is for a tort; but the duty the violation of which gives the ground of action grows out of a contract. The petition alleges that the defendant was negligent in not furnishing a safe engine and a competent engineer, and that from this negligence the deceased received the injuries which resulted in his death. The duty of furnishing the deceased a safe engine grew out of the relation of master and servant, and this relation was created by his contract of employment. We think it follows that if the deceased was employed as conductor of a train by a company operating the road under a lease, and the injury resulted from the incompetence of the engineer, or the imperfection of the engine furnished him by the lessee, the latter would be liable, and not the lessor. It does not do to say that the lessee would be the agent of the lessor. As applied to this case, this would be a mere fiction, not based upon any sound rule of law. The lessee under an unauthorized lease may be deemed the agent of the lessor so far as the latter's duties to the public are concerned.

Having undertaken by its charter to operate its road, the company which it puts in charge of its line may be looked upon as its agent so far as its general duties under its franchises are concerned. But the duty which is owed to an employee of the lessee is a special one, and not a duty owed to him in common with the general public.

It is also urged that we are in error in holding that the mother of the deceased was barred of her right of action by the statute of limitations. She was a necessary party to the suit, either as plaintiff or beneficiary, in the first instance. She was not made a party until more than one year had elapsed since the death of her son. The amendment which

alleged her existence and prayed a recovery for her benefit as well as that of the other plaintiffs presented for the first time her right, and it was a new cause of action so far as she is concerned. We see no reason why the rule that applies to tenants in common in suits for the recovery of land, that one may be barred though the others are not, should not apply in this case.

The motion for a rehearing is overruled.

RAILROAD COMPANIES LEASING THEIR LINES of road to other companies do not thereby exonerate themselves from their duty to the public with respect to the correct operation of such lines: *Harmon v. Columbia etc. R. R. Co.*, 28 S. C. 401; *ante*, p. 000, and note.

SUPREME COURT PRACTICE. — Where a transcript appears complete, with the proper certificate appended, it cannot be varied or changed by affidavits of the clerk of the lower court, or others, saying that the judge's certificate and the short-hand reporter's notes in full-hand have not been filed below: *Corliss v. Conable*, 74 Iowa, 58. But an appellant can by leave of court file an amended abstract before the argument of appellee has been served upon him: *Gronoweg v. Kuusworm*, 75 Id. 237; compare *Stanley v. Barringer*, 74 Id. 34; *Hart v. Pottawattamie*, 74 Id. 39. See also *Hunter v. City of Des Moines*, 74 Id. 215; *Green v. McMann*, 79 Cal. 561.

GULF, COLORADO, AND SANTA FÉ R'Y CO. v. STATE.

[72 TEXAS, 404.]

PARALLEL AND COMPETING LINES OF RAILROAD. — A petition which charges that certain lines of railroad, by their conspiracy, contract, combination, and copartnership, have formed a consolidation of parallel and competing lines, in the absence of any exception to the vagueness or indirectness of the allegation, sufficiently alleges that the companies were owners of parallel and competing lines of railroad.

COURT MAY TAKE JUDICIAL NOTICE OF LEADING GEOGRAPHICAL FEATURES of the land. And the locality of important lines of railroad, once established, becomes as fixed and permanent and is as well known as any other geographical feature of the country.

COURT MUST TAKE JUDICIAL NOTICE that the Houston and Texas Central and the Gulf, Colorado, and Santa Fé railroads are parallel and competing lines of railroad in Texas.

ASSOCIATION OF RAILROAD COMPANIES TO PREVENT COMPETITION ILLEGAL WHEN. — When one railroad company enters into an agreement with other railroad companies, any one of which owns or controls a competing line of railroad, by which it subjects itself to the government of a body appointed by all the parties to the agreement, it places itself under the control of such other company, and violates the constitution of Texas. And if one company is prohibited from making such a contract, two or more are so prohibited. The extent of the control is immaterial. Nor does it make any difference that any member of such associati-

may withdraw from it, or that no charges had been made or agreed upon in excess of the rates fixed by statute.

INTERSTATE COMMERCE—STATE CANNOT REGULATE.—State cannot control combinations of railroad companies not chartered by it in transporting freight to and from other states; but if railroad companies are chartered by the state, and two or more of them are parallel and competing lines, and they combine with others not subject to control by the state for a purpose prohibited by its constitution, such combination will be unlawful, and may be enjoined.

SUIT for injunction. The opinion states the case.

Baker, Botts, and Baker, and J. W. Terry, for the appellants.

J. S. Hogg, attorney-general, for the state.

GAINES, A. J. This suit was brought in the name of the state by her attorney-general to restrain certain railroad companies engaged in operating lines within the state from carrying out an agreement entered into by them by which they committed to a body of representatives of the companies the power to fix the rates for which freights should be carried to or from points within the state. The theory of the state's case is, that the parties to the agreement are parallel and competing lines, and that the association formed by it is prohibited by section 5 of article 10 of the constitution, which provides that "no railroad . . . or managers of any railroad corporation shall consolidate the stock, property, or franchises of such corporation with . . . or in any way control any railroad corporation owning or having under its control a parallel or competing line."

The first assignment of error is, that "the court erred in finding that many of the railroad companies defendant own and control parallel and competing lines, because, as defendants claim, there is no such admission in the answers, nor is there such an allegation in the state's petition, except that defendants are averred to be made parallel and competing lines by the action of said Texas Traffic Association."

Under this assignment we will first consider the allegations in the petition. The petition alleges the authority by which the respective charters of the defendant corporations were granted, and defines the lines of railroad respectively operated by them, and then charges "that the lines so owned and operated by the defendants are the main trunk lines and leading railways in Texas, and so traverse the state as to touch and penetrate her commercial centers, and become and are

lawful competitors for the country's traffic concentrated in the cities aforesaid."

After alleging the formation of an executive committee of the traffic association by the agreement the carrying out of which is sought to be restrained, the petition also avers "that each of said executive committee, and each of the employees of said association, is an officer of each and all the defendants, . . . and are in common employed and paid by them, and that each of said railroad companies is a competing line for Texas traffic and trade." Also, referring to the association formed by the agreement, the petition charges "that said railway companies, by their said conspiracy, contract, combination, and copartnership, have formed a consolidation of parallel and competing lines," etc.

The exceptions to the petition are upon grounds that would have been raised by a general demurrer. There is no exception on account of vagueness or indirectness of the allegations. In the absence of such an exception, every reasonable intendment must be indulged in favor of the sufficiency of the petition: See District Court Rules, 17, 18, 47 Tex.; *Burks v. Watson*, 48 Id. 108. We think it sufficiently appears from the allegations quoted above that the defendant companies are alleged to be owners and operators of parallel and competing lines of railroad.

But the further question is presented, whether from the admissions in the pleadings and facts of which the court could take judicial notice it was authorized to make the finding complained of in the assignment of error. The case was submitted to the court for final disposition upon the petition, the answers, and the supporting affidavits.

The answers of the Gulf, Colorado, and Santa Fé Railway Company, and of the Fort Worth and Denver City Railway Company, formally admit all allegations of the petition which are not therein specifically denied. The St. Louis, Arkansas, and Texas Railway Company adopt the answer of the Santa Fé company. The answers of these defendants do not deny the roads of the defendant companies are parallel or competing lines, therefore the fact may be considered established as to them. On the other hand, the other defendants in their answers deny all the allegations of the petition not specially admitted in such answers, and we find in their pleadings no admission that any one of the railroads are parallel to or a competitor for traffic with any other. Unless, therefore, the

court could know judicially that two or more of the roads which were operated by the members of the association were parallel or competing lines, the finding was not warranted against the last-named defendants. In Wharton on Evidence it is said: "Our own law . . . adopts the position that reason and evidence are the co-ordinate factors which go to make up proof, and that a judge in trying a case must not only exercise his own logical faculties in construing and applying evidence, but must draw on his own sources of knowledge for such information as is common to all intelligent persons of the same community. Such information must not only be thus common, but must be of undisputed truth. When it becomes disputable, it ceases to fall under the head of notoriety": 1 Wharton on Evidence, sec. 329.

The supreme court of the United States say: "It certainly cannot be laid down as a universal or even as a general proposition that the court can judicially notice matters of fact. Yet it cannot be doubted that there are many facts, particularly with respect to geographical positions, of such public notoriety, and the knowledge of which is to be derived from other sources than parol proof, which the court may judicially notice. Thus in the case of *United States v. La Vengeance*, 3 Dall. 297, the court judicially noticed the geographical position of Sandy Hook, and it may certainly take notice judicially of like notorious facts, as that the bay of New York, for instance, is within the ebb and flow of the tide": *Peyroux v. Howard*, 7 Pet. 324. "A court is bound to take judicial knowledge of the leading geographical features of the land, the minuteness of the knowledge so expected being in inverse proportion to the distance": 1 Wharton on Evidence, sec. 339. The principle has been applied in various ways, as the following cases will show: *Trenier v. Stewart*, 55 Ala. 458; *Gibson v. Stevens*, 8 How. 399; *Venderwerker v. People*, 5 Wend. 530; *Pearce v. Langfit*, 101 Pa. St. 507; 47 Am. Rep. 737; *Steinmets v. Versailles etc. Co.*, 57 Ind. 457; *Tewksbury v. Schulenburg*, 41 Wis. 584; *Walker v. Allen*, 72 Ala. 456; *Oppenheim v. Wolf*, 3 Sand. Ch. 571; *Neaderhouser v. State*, 28 Ind. 257.

In *East Line etc. R'y Co. v. Rushing*, 69 Tex. 306, Chief Justice Willie says: "It may be that this court, judicially knowing the geography of the state, might take notice of the general direction of these two roads as fixed by the statute under consideration, that their lines must necessarily cross each other, and could therefore treat them as connecting lines,

and not paralled to each other. But as to whether they are competing lines we can have no judicial knowledge whatever."

This latter proposition, as a general rule, and as applied to the case then before the court, is undoubtedly correct. Whether two roads which intersect each other at a certain point are competitors for freight or not must depend upon a variety of circumstances not known to the court. But the authorities cited show that we must take notice of the geography of the state, and at least of its navigable streams. It is a matter of history that important lines of railroad, once established, have remained as fixed and as permanent in their course as the rivers themselves. They supersede in the main all other modes of travel between the points which they touch, and become as well if not better known than any other geographical feature of the country. Their locality becomes "notorious and indisputable." For instance, can we doubt that the Houston and Texas Central road runs from Houston to Dallas, and that the Gulf, Colorado, and Santa Fé touches with its lines the same points? Can we doubt that they run during a considerable portion of their lines practically parallel to each other, and that they must necessarily compete for the traffic lying between them? We think we must take judicial notice that these two roads are parallel and competing lines, and this is sufficient so far as the disposition of this case is concerned. We are of opinion that the finding would have been sufficient to support the judgment if it had been that but two of the defendants were competitors with each other for traffic. The same may be said as to the portions of the lines of the Texas and Pacific company and of the St. Louis, Arkansas, and Texas company which extend from Sherman to Texarkana. We cannot shut our eyes to the "notorious and indisputable" facts that these parts of the respective lines touch at the same points, and that they are natural competitors for the traffic of a large scope of country.

Under the next succeeding assignments of error, it is insisted by counsel for appellants that the agreement in controversy, which establishes the Texas Traffic Association, is not in violation of section 5, article 10, of the constitution. In order to determine this question, we will give briefly some of the prominent provisions of the articles of agreement by which the association is created. Among its purposes stated in the preamble is that "of preventing sudden and extreme fluctuations in Texas rates, alike injurious to the public

and the transportation companies." Article 1 provides that "the traffic subject to this agreement shall be all freight and passenger business, except express and mail carried by lines parties hereto, which has origin or destination within the state of Texas, other than business to or from El Paso, Eagle Pass, and Laredo proper." The managing body of the association is an executive committee composed of one member from each party to the agreement. They are to elect a commissioner, who is the chief executive officer. "The executive committee shall agree upon the classification and rates covering the traffic subject to this agreement. No member shall, directly or indirectly, reduce rates," etc. Any violation of the agreement is to be reported to the commissioner, who shall "check the irregularity, if he can." "All rates, rules, regulations, and decisions, when adopted by agreement or by arbitration, shall be simultaneously furnished by the commissioner to the traffic departments of all members of the association, for the guidance of all the parties in interest," etc.

Without quoting further, we think it apparent that a leading object, if not the sole object, of the association is, by the appointment of a common governing committee, to fix rates of transportation so as to prevent competition among the several parties to the contract. We think it also apparent, from the language of the section of the state constitution, that its leading object was to prevent competing lines of railroad in the state from so fettering themselves by consolidation, lease, or other agreement by which one should, in any way, subject itself to the control of another, so as to stifle competition for the traffic of the state. The section prohibits any railroad company, or the managers of any such company, from controlling, in any way, another company owning a competing line. If one is prohibited from making such contract, we think two or more are so prohibited, and that when one company enters into an agreement with others, any one of which owns or controls a competing line of railroad, by which it subjects itself to the government of a body appointed by all parties to the agreement, that such company places itself under the control of the other to a definite extent, and acts in violation of the constitution of the state. The manner and extent of the control are immaterial. The language of the constitution clearly evinces that control in any manner and to any extent was intended to be prohibited, provided it was

such as is calculated to enable the one railroad, by means of a contract or agreement for an interference in the other's affairs, to keep down competition between them.

But it is insisted that because a unanimous vote of the committee is required to adopt any proposition involving revenue, because the rates are subject to be changed in a certain manner pointed out in the agreement, because any member may withdraw upon giving ninety days' notice, and because no penalty is prescribed for a violation of the articles, the agreement does not subject one road to the management or control of another.

But it is apparent that as long as one company remains a member of the association, it is controlled as to rates by the executive committee, and is not free to enter into competition with its associates for freights. It may be that, by its representative refusing his assent to any proposition fixing rates in the first instance, that it could not be controlled in this respect; but when once fixed, it would be powerless to secure a change without the consent of the representatives of the others. Besides, the executive committee, upon its appointment, are made, to the extent of their powers, managers of all the companies; and hence, when a company subjects itself to the power of the committee by entering the association, it places itself under the control of managers of other railroads. We cannot see that the facts that a member has the right of withdrawal, or that it cannot be punished for a failure to obey the regulations, can make any difference as to this question. If any one of defendants had withdrawn when this suit was filed, the allegation of that fact would have been an answer as to that company to the state's petition.

But it is further argued that because it has not been shown that they have made charges for freight or passengers in excess of the limits allowed by law, their action is not illegal. But we do not understand that the state seeks to restrain them for illegal charges made under the direction of the association, but for doing an illegal thing in entering into and carrying out the terms of the agreement for the association. It is not quite clear to our minds that, even in the absence of the constitutional provision we have had under discussion, the defendant association could not be enjoined as being in restraint of competition, and contrary to public policy.

But it is further insisted that because the agreement in

question concerns interstate commerce, neither the state in its political capacity nor its courts have any jurisdiction over the matter. We understand the agreement to embrace both commerce within the state and between this state and other states. The former might be enjoined if the latter could not. We are inclined to the opinion that if none of the corporations composing the association owed their existence to our laws, that the state would have no power to prohibit or interfere with a contract of this character in so far as it regulated charges upon freight carried to and fro between this and other states: *Wabash etc. R. R. Co. v. People*, 118 U. S. 557.

But we think we have here a very different question. Several of the defendant corporations are chartered under the laws of this state,—notably the Gulf, Colorado, and Santa Fé Railway Company and the Houston and Texas Central Railway Company. If we are correct in our conclusion, we think it follows that the defendant corporations who derive their charters from this state are acting in violation of law in entering into this contract of association, some of the members of the association being competing lines of roads. We think that the association, being illegal as to some of the defendants, is illegal as to all. It may be that should the companies which have their charters from the United States or from other states come into this state, and enter into a similar arrangement among themselves, the state would be powerless to interfere, because of it being a matter within the exclusive jurisdiction of the United States. Their contract might not be a violation of our laws, because we could make no laws interfering with interstate commerce. But it does not follow that they would enjoy the immunity of entering into contracts with our own corporations which are prohibited to the latter, and thus enable them to set at naught the limitations upon their powers. There are certainly many things the state may do in exercise of its police powers which may affect commerce between the states or between this state and foreign countries; but how far the police power of the state may extend so far as it affects the question before us, we need not inquire.

We are of the opinion that the association under consideration is clearly illegal as to some of the parties to it, and that being illegal as to some, it is illegal as to all, and may be restrained.

The judgment is therefore affirmed.

JUDICIAL NOTICE. — Courts take judicial notice of general geographical facts: Note to *Lanfear v. Mestier*, 89 Am. Dec. 676; *Hyatt v. James*, 2 Bush, 463; 92 Am. Dec. 505; *Pearce v. Langfit*, 101 Pa. St. 507; 47 Am. Rep. 737; *Boston v. State*, 5 Tex. App. 383; 32 Am. Rep. 575; compare *Anderson v. O'Donnell*, 29 S. C. 355; *ante*, p. 728, and note.

INTERSTATE COMMERCE. — State statutes attempting to regulate interstate commerce are unconstitutional and void: *Ex parte Rosenblatt*, 19 Nev. 439; 3 Am. St. Rep. 901. The legislature of a state cannot itself nor can it create a commission with power to fix rules and regulations for transportation over a route which extends partly over an adjoining state; for Congress alone has interstate supervision: *State v. Chicago etc. R'y Co.*, 40 Minn. 267; 12 Am. St. Rep. 730.

CORPORATIONS. — Transfers of the powers of one corporation to another are against public policy, and not enforceable in courts of law: *Chicago etc. Co. v. People's etc. Co.*, 121 Ill. 530; 2 Am. St. Rep. 124.

MAIN v. BROWN.

[72 TEXAS, 506.]

CLOSE OF ADMINISTRATION NOT PRESUMED FROM MERE LAPSE OF TIME. —

In the absence of any statute fixing the term of an administration, an administrator is not relieved from being called to account in the probate court by the mere lapse of time without any action by the court.

ADMINISTRATOR IS TRUSTEE CHARGED WITH MANAGEMENT OF TRUST ESTATE under the rules of the probate law, and he cannot plead his own laches as a bar to the jurisdiction of the probate court to compel him to make settlement of such trust estate.

COLLECTION OF RENTS OF PROPERTY OF ESTATE BY ADMINISTRATOR is an act done in the administration of the estate, and rebuts any presumption that the administration has been closed so as to deprive the probate court of jurisdiction to compel him to render an account and make settlement.

APPLICATION for certiorari. The opinion states the case.

W. A. Crafts, and Coopwood and Son, for the plaintiff in error.

Waul and Walker, for the defendant in error.

COLLARD, J. On November 28, 1862, James G. Brown, defendant in error, was appointed by the probate court of Cameron County administrator with the will annexed of the estate of Ramon de Lorasquitu, deceased. The will divided the property of deceased equally between his four children, Petra, Angel, Pedro, and Refugia, at the time minors. The administrator gave bond in the sum of eight thousand dollars, which was duly approved and ordered to record, but it was not recorded, and was lost from the files. Appraisers were appointed

to value the estate November 28, 1862, but if any inventory was ever filed the records and files do not show it. On the twenty-ninth day of May, 1863, Brown was also appointed, by the same court, guardian of the persons and estates of the minor legatees.

No order was made or paper filed in the succession from the 28th of November, 1862, until August 23, 1879, sixteen years and nine months, when a motion was filed in the probate court by Petra, Angel, and Pedro, then aged twenty-five, twenty-four, and nineteen years respectively, setting out the foregoing facts, and charging the administrator with having taken into his possession the whole of the estate, alleged to have been worth twelve thousand dollars, and that he had never accounted for any of it, except a part of a lot and house on Market Square, in the town of Brownsville, and ninety dollars in rent on another house on Elizabeth Street, in same town, and that this was done between September 1, 1878, and June 1, 1879. The relators prayed that the administrator be required to file a new bond, his bondsmen being insolvent and having moved out of the state; also, that he be required to file an inventory of the estate, an exhibit, and account.

After some delay the administrator filed his account, which brought the estate in his debt \$5,977.38, charging the minors with board, schooling, and clothing,—Petra with \$2,950, Angel with \$2,600, and Pedro with \$1,150. These, with other items charged to the estate, aggregated \$7,711.38. Credits were admitted amounting to \$1,734, leaving the estate, as before stated, in debt to the administrator \$5,977.38.

The account was contested, many items were disputed, and it was charged that the administrator had not accounted for all the property received. After hearing the evidence, the probate judge restated the account so as to charge the administrator with \$2,880 cash, and to credit him with the same amount, so the debits and credits exactly balanced, leaving for distribution between the legatees the two lots and houses. It was ordered accordingly on March 22, 1881.

On July 6, 1881, Petra and Angel applied to the district court of the county for a *certiorari* to bring the cause before that court for revision. The writ was granted, but the administrator moved to dismiss the proceeding upon the ground that the probate court had no jurisdiction. The court sustained the motion, and Petra de Lorasquitu's executor, she having died, has brought the cause to this court by writ of error.

It is claimed by defendant in error that so long a time elapsed, sixteen years and nine months, during which the administration was ignored by the probate court that it would be conclusively presumed to have been closed. We cannot agree to the proposition contended for by defendant in error. In support of his position he cites the cases of *Murphy v. Menard*, 14 Tex. 62, *Portis v. Cummings*, 14 Id. 139, and *Marks v. Hill*, 46 Id. 350.

The case of *Murphy v. Menard*, *supra*, turned upon the statute of 1840, which limited the period of administration to one year from the day of appointment of an administrator, with power in the court to extend the time on good cause shown. The court had extended the administration for one year, and upon the expiration of the time as extended, the administrator rendered an account of the assets in hand and the condition of the estate. Nothing more was done until seven years thereafter, when an administrator *de bonis non* was appointed. It was decided that after the lapse of such time no legal administration *de bonis non* could be had.

The case of *Portis v. Cummings*, *supra*, rests upon the authority of *Murphy v. Menard*, *supra*, and the statute of 1840, above cited. In that case the administration was granted in 1839; by order of the court the term of administration was extended to the December term, 1840. In January, 1841, the administratrix was cited to render final account, which was rendered on the following February. There was no other act done in the administration until in November, 1849, when she was cited to account upon the application of one of the heirs of the estate. It was held that, "*prima facie*, the presumption must be that her official connection with the succession in the character of administratrix had been determined," but it was also held that the presumption might have been rebutted by showing that the administration had not been closed and that the administratrix was still acting in that capacity.

These two cases cannot be invoked in support of the position of defendant in error, because what was said to establish the doctrine was due to a statute which required the close of an administration in one year after letters were granted, unless extended by the court. The decision in the other case cited, *Marks v. Hill*, *supra*, rests upon the want of power in the probate court to grant the order made. "After a lapse of over ten years without any action in the administration," the court say in that case, "it may well be held that the administration

was no longer open. . . . But even if the administration were still open, we are of opinion that the order of the court was unauthorized." The order in question was one setting aside property of the estate at its appraised value to the widow of deceased for a year's support. There was no law authorizing this disposition of the estate at the time and for a long time after the administration was granted; and while an act was passed afterwards, and in existence at the time of the order authorizing such action, it was held that as the law required this to be done at the first term of the court after the grant of letters, the act would not have an indefinite retroactive operation. In this view of the matter the court held the action of the court null and void.

Without a statute or a well-established rule to that effect, we would be loath to hold that mere lapse of time without action by the court in an administration would relieve the administrator from being called to account in the probate court. Since the administration upon the estate of Ramon de Lorasquitu was granted, there has been no statute in this state fixing the term of an administration. An administrator may be cited by an heir or by the court to render his final account and close the estate, or he may himself file the account and ask his discharge by the court after the estate has been fully administered. Certain formalities are required and certain conditions must exist as laid down in the statute before the administrator can be discharged, and these provisions of the law have been in force since the act of 1848. He ought not to be allowed to discharge himself by his own neglect of duty. When the estate is ready to be closed, it is his duty to render an account to the probate court of his acts, the money received and disbursed, and to show the present condition of the estate.

There is a distinction in holding an administration closed for some purposes and for calling the administrator to account in the probate court. He is a trustee, charged with the management of a trust estate under the rules of the probate law. He ought not to be allowed to plead his own laches as a bar to the jurisdiction of the court to compel him to make settlement of the trust estate. The law has fixed the jurisdiction, and he should not be allowed to evade it by his own wrong and neglect. His laches might be pleaded by others so as to deprive the court of jurisdiction to order sales of the estate, to reopen the succession, and for some other purposes, but he should not be heard to deny the court's power, conferred by

statute, to cite him to account upon such grounds. In the absence of a statute or a decision of our courts fixing some definite limit to the term of administrations, we cannot say that the administrator of Lorasquitu's estate is entitled to the legal presumption that the succession was closed, and that the probate court had, merely by the lapse of time as shown in which no order was made, lost its power to compel him to render a final account, and make settlement with the legatees.

In his final account, and in response to the citation of the court to make settlement, he acknowledged that he had some of the estate property still in his hands,—a note, \$280 in Mexican coin, and one pair of ox-cart wheels,—and that he rented the real estate from 1865 to 1878. These facts deny the presumption he seeks to invoke, at least the renting of the houses does. By this he admits he was still, up to 1878, acting as administrator of the estate. If the administration would, after such lapse of time, be presumed to have been closed so as to deprive the court of jurisdiction, the presumption could not be indulged against the fact that he was still acting in the capacity of administrator.

We conclude the judgment should be reversed, and the cause remanded for trial.

EXECUTORS AND ADMINISTRATORS hold the property of their intestate as trustees, and are in a fiduciary relation thereto: Note to *Miles v. Thorne*, 99 Am. Dec. 394-396; *Petersen v. Chemical Bank*, 32 N. Y. 21; 88 Am. Dec. 298; *Lawson v. Powell*, 31 Ga. 681; 79 Am. Dec. 296; *Slater v. Hurlbut*, 146 Mass. 306; *Loveman v. Taylor*, 85 Tenn. 1; *In re Niles*, 113 N. Y. 547; *Lucas v. Donaldson*, 117 Ind. 139; *Pierce v. Holzer*, 65 Mich. 263; *Bowden v. Pierce*, 78 Cal. 459.

ACQUIESCENCE IN A SETTLEMENT and lapse of time will bar the presentation of a claim made after twenty years: *Yearly v. Cockey*, 68 Md. 174. But until final accounts and settlements of executors and administrators are made, filed, and properly disposed of, the statute of limitations will not begin to run: *Reaves v. Roberson*, 99 N. C. 425.

CITY OF GALVESTON v. HEMMIS.

[72 TEXAS, 552.]

LIABILITY OF CITY FOR INJURY RESULTING FROM DEFECTIVE SIDEWALKS. — In a suit brought by a special policeman to recover damages against the city by which he was employed for injuries received by him by reason of a defective sidewalk, it will not be presumed that the plaintiff had the same or equal knowledge of the defect that the city had, when he testifies that he did not know of the defect; and a verdict in his favor will not be set aside as against a charge that if the jury find that the plaintiff was in the employ of the defendant, and had the same or equal means of knowing the condition of the sidewalk, where he was injured, as did the defendant, and if the defect was patent, they should find for the defendant.

POLICEMAN DOES NOT ASSUME RISKS INCIDENT TO DEFECTIVE SIDEWALKS and highways in the city in which he is employed, and does not stand in the same relation to the city that employees of private corporations do to their employers, and is not subject to the restricted rights of such relation.

CONTRIBUTORY NEGLIGENCE. — Where a plaintiff testifies that he exercised care to avoid the injury complained of, a verdict in his favor will not be set aside on the ground that such injury was the result of his own want of care.

REASONS GIVEN BY JUDGE FOR REFUSING NEW TRIAL. — If the refusal of a motion for a new trial be correct, the fact that the judge gave an erroneous reason for such refusal will not be a ground for reversing the judgment.

NEW TRIAL SHOULD BE GRANTED OR REFUSED WITHOUT REGARD TO FINANCIAL CONDITION of the parties, or to the facilities for appealing possessed by either of them.

ACTION for personal injuries. The opinion states the case.

George P. Finlay, for the appellant.

Wheeler and Rhodes, for the appellee.

COLLARD, J. Appellant's first assignment of error is that the verdict of the jury is contrary to the following instruction of the court, given at request of defendant: "If you believe, from the evidence, that the plaintiff was in the employ of the defendant, and had the same or equal means of knowing the condition of the sidewalk, where he was injured, as did the defendant, and that the defect was patent, open, and visible, then you will find for the defendant."

By this charge two questions of fact were presented to the jury, the finding of both of which in the affirmative was necessary to a finding for defendant. The defect consisted in having the steps leading from the sidewalk to the pavement shorter than the width of the sidewalk. Plaintiff, while

acting as a supernumerary policeman, on the night of April 5, 1885, intended to pass from the sidewalk on the Strand, at the Moody corner, into the street, on the steps, missed the second step, and coming to the pavement, broke his hip; his left foot landed on the top step so near the end that when he stepped with his right foot, it missed the next step entirely, passing to the right of it, and landed on the pavement. It was at night, and the only light in the neighborhood was at the bank corner, so dim, he says, that he could not see across the street with it. He says he saw the step, and supposed it went all the way along the width of the sidewalk; did not examine. He says he was on the beat once or twice as a supernumerary; was not acquainted or familiar with the beat; did not make himself acquainted with people's sidewalks; did not think it was any of his business; had no instructions to do so; looked to see if everything was locked. He also says: "I was satisfied there was a step; but it was pretty dark, and I could not see."

He testified that he was careful in getting down on the step. The roster showed that he had been on that beat, seven times in all, at night, from February 20 to April 5, 1885. The steps had been in the same condition as on the night of the accident five or six years, and the sergeant of the police testified that the plaintiff had been on that beat as supernumerary two or three times. He had been a regular policeman before this, and the sergeant testified he had then been on the beat, and had been there long enough to know it. Plaintiff says he knew rule 27 of the police regulations, which is as follows: "The prevention of crime being the most important object in view, the patrolman's exertions must be constantly used to accomplish that end; he must examine and make himself acquainted with all parts of his post, and vigilantly watch every description of person passing his way, and he must, to the utmost of his power, prevent the commission of assaults, breaches of the peace, and all other crimes about to be committed." There was evidence tending to show that the steps were dangerous, and that a man of ordinary prudence might step off there at night; also, that the steps could be made safe by extending them the entire width of the sidewalk, as was now being done, when put down in other places. After plaintiff's accident, these steps were reported as defective by the policeman on duty there.

Now, the question is, Ought this court to say the verdict of

the jury was contrary to the charge of the court under the evidence, in that it failed to find that plaintiff had the same or equal means of knowing the condition of steps and sidewalk that defendant had? We think not. Defendant knew with certainty the condition of its steps and sidewalk; it placed them there. Plaintiff was only on duty there on several occasions recently before the accident, and that at night. Had the jury found it was his duty to have known the existence of the defect under proper instructions, we would not, as an appellate court, feel authorized to set the verdict aside; nor can we say, in opposition to the verdict, that plaintiff had the same or equal means of knowing there was a defect as did the defendant. The jury also found that the defect was not open and visible. In doing so, they very properly viewed the matter from the plaintiff's standpoint. He was on duty there at night; the place was not lighted, at least not sufficiently lighted to enable him to see; and as to him, under these circumstances, the jury might well conclude that the defect was not visible. It was proved that the steps were unsafe at night to persons passing as plaintiff was. There was evidence *contra*, but it was the duty of the jury to reconcile the conflict; and having done so, it is not our province to interfere.

Appellant's second assignment of error complains that the verdict of the jury is contrary to the evidence and the following charge of the court. The charge referred to instructs the jury that the city of Galveston is bound to keep its streets and sidewalks and approaches thereto in reasonably safe condition for use by persons of ordinary care and prudence, but are not absolute insurers of their safety; that night-policemen and supernumerary night-policemen in the pay of the city are its employees, and assume all the risks ordinarily incident to such employment; and where there may be an open defect in the approaches from the street to the sidewalk, and the policeman knew of such defect, or where the defect was open to ordinary observation, and such night-policeman had been on that beat where the defect existed sufficiently long to have become aware of such defect, then the policeman is presumed to have assumed all risks incident to such defect.

The appellee contends that the foregoing instruction is not the law; that policemen do not assume risks incident to defective sidewalks and highways. Thompson, in his work on

negligence (vol. 2, p. 1242, sec. 17), sustains appellee's view of the law. He says: "A police-officer or fireman has no such relation by virtue of his employment to the city whose officer he is to prevent him from maintaining an action to recover for injuries received by reason of a defective highway therein."

He cites, in support of the text, *Kimball v. Boston*, 83 Mass. 417, which supports the doctrine in unqualified terms. He also cites *Palmer v. Portsmouth*, 43 N. H. 265, which rests the doctrine upon a statute. The reason of the rule seems to be that police-officers act in their capacity of public officers, and not as agents or servants of the city.

The statute of this state makes policemen of incorporated cities and towns public officers, that is, peace officers, and clothes them with the powers and duties of other peace officers: Code Crim. Proc., arts. 44, 45. They do not stand in the same relation to the city, then, that the employees of a railroad company or other private corporation do to their employers, and are not subject to the restricted rights of such relations.

It might be admitted, however, that the charge of the court presents the law correctly, and still it could not be said that the verdict was not in accord with it under the evidence. The charge does not have the policeman to assume the risk incident to the defect in the approach from the street to the sidewalk, unless the policeman knew of the defect, or in case the defect was open to ordinary observation, and he had been on the beat sufficiently long to have become aware of it. The jury had evidence before them to sustain their finding under the charge. Plaintiff testified that he did not know of the defect, but that he supposed the steps were long enough. He was only a supernumerary, and had only been on the beat at night on several occasions recently before his injury, except a long time before, when he was a regular policeman, and from this the jury might have properly concluded that he had not been on the beat long enough to have discovered the short steps. They had the right to consider that his service there was at night. The verdict was not at variance with the evidence and the charge.

The third assignment of error is not well taken. It complains that the court should have granted a new trial, because the verdict was contrary to the law and evidence, and especially contrary to the charge which directed the jury to find for defendant if plaintiff's injuries were the result of his own

the jury was contrary to the charge of the court under the evidence, in that it failed to find that plaintiff had the same or equal means of knowing the condition of steps and sidewalk that defendant had? We think not. Defendant knew with certainty the condition of its steps and sidewalk; it placed them there. Plaintiff was only on duty there on several occasions recently before the accident, and that at night. Had the jury found it was his duty to have known the existence of the defect under proper instructions, we would not, as an appellate court, feel authorized to set the verdict aside; nor can we say, in opposition to the verdict, that plaintiff had the same or equal means of knowing there was a defect as did the defendant. The jury also found that the defect was not open and visible. In doing so, they very properly viewed the matter from the plaintiff's standpoint. He was on duty there at night; the place was not lighted, at least not sufficiently lighted to enable him to see; and as to him, under these circumstances, the jury might well conclude that the defect was not visible. It was proved that the steps were unsafe at night to persons passing as plaintiff was. There was evidence *contra*, but it was the duty of the jury to reconcile the conflict; and having done so, it is not our province to interfere.

Appellant's second assignment of error complains that the verdict of the jury is contrary to the evidence and the following charge of the court. The charge referred to instructs the jury that the city of Galveston is bound to keep its streets and sidewalks and approaches thereto in reasonably safe condition for use by persons of ordinary care and prudence, but are not absolute insurers of their safety; that night-policemen and supernumerary night-policemen in the pay of the city are its employees, and assume all the risks ordinarily incident to such employment; and where there may be an open defect in the approaches from the street to the sidewalk, and the policeman knew of such defect, or where the defect was open to ordinary observation, and such night-policeman had been on that beat where the defect existed sufficiently long to have become aware of such defect, then the policeman is presumed to have assumed all risks incident to such defect.

The appellee contends that the foregoing instruction is not the law; that policemen do not assume risks incident to defective sidewalks and highways. Thompson, in his work on

negligence (vol. 2, p. 1242, sec. 17), sustains appellee's view of the law. He says: "A police-officer or fireman has no such relation by virtue of his employment to the city whose officer he is to prevent him from maintaining an action to recover for injuries received by reason of a defective highway therein."

He cites, in support of the text, *Kimball v. Boston*, 83 Mass. 417, which supports the doctrine in unqualified terms. He also cites *Palmer v. Portsmouth*, 43 N. H. 265, which rests the doctrine upon a statute. The reason of the rule seems to be that police-officers act in their capacity of public officers, and not as agents or servants of the city.

The statute of this state makes policemen of incorporated cities and towns public officers, that is, peace officers, and clothes them with the powers and duties of other peace officers: Code Crim. Proc., arts. 44, 45. They do not stand in the same relation to the city, then, that the employees of a railroad company or other private corporation do to their employers, and are not subject to the restricted rights of such relations.

It might be admitted, however, that the charge of the court presents the law correctly, and still it could not be said that the verdict was not in accord with it under the evidence. The charge does not have the policeman to assume the risk incident to the defect in the approach from the street to the sidewalk, unless the policeman knew of the defect, or in case the defect was open to ordinary observation, and he had been on the beat sufficiently long to have become aware of it. The jury had evidence before them to sustain their finding under the charge. Plaintiff testified that he did not know of the defect, but that he supposed the steps were long enough. He was only a supernumerary, and had only been on the beat at night on several occasions recently before his injury, except a long time before, when he was a regular policeman, and from this the jury might have properly concluded that he had not been on the beat long enough to have discovered the short steps. They had the right to consider that his service there was at night. The verdict was not at variance with the evidence and the charge.

The third assignment of error is not well taken. It complains that the court should have granted a new trial, because the verdict was contrary to the law and evidence, and especially contrary to the charge which directed the jury to find for defendant if plaintiff's injuries were the result of his own

want of care. The court very properly left this question to the jury. Plaintiff testified that he was ignorant of the condition of the steps; that he supposed, as he had the right to do, that they extended the whole width of the sidewalk (2 Dillon on Municipal Corporations, sec. 1007, p. 1023), and that he was careful in getting down on the step. We see, then, that there was evidence to support the verdict under the charge, which, if credited by the jury, warranted the conclusion arrived at by them.

The fourth assignment of error is not set out in appellant's brief, but the proposition under it is as follows: "When the verdict is contrary to the law and the evidence, and contrary to the instruction of the court, it is the duty of the court to grant a new trial without regard to the financial condition of the parties."

The trial judge remarked from the bench, as a reason for overruling the motion for a new trial, "that the question whether a policeman was an employee had never been passed upon by the supreme court, and as the city could appeal without giving bond, and had plenty of money to pay for the transcript, and the plaintiff was poor, he would overrule the motion." The judge signed a bill of exceptions for defendant containing the above as his reason for overruling the motion for a new trial. It was the duty of the judge to grant the new trial, if he was of opinion the evidence did not support the verdict under the law, and if he thought he had charged the law on the question of policemen being employees of the city. The financial condition of the parties ought not to influence the court in passing upon a motion for a new trial. The facilities with which one of the parties can appeal ought not to be considered as a reason. It is not a reason.

We have already expressed our opinion upon the law as given in the charge, that the charge is incorrect; that policemen are not employees of the city, and do not assume risks of bad and defective passways; so the ruling of the court upon the reason assigned is relieved of the error it would have if the law as given in his charge had been correct. The court did overrule the motion, and it is apparent he would have done so if he had thought the law was as we have stated it to be. The error is harmless, and should not require a reversal of the case.

We conclude the judgment of the court below should be affirmed.

MUNICIPAL CORPORATIONS. — When defective sidewalks in a city cause personal injury to a person, the city is generally liable, if it had proper notice of the defective condition thereof: *Dundas v. City of Lansing*, 75 Mich. 499; *ante*, p. 457, and note; *Village of Ponca v. Crawford*, 23 Neb. 662; 8 Am. St. Rep. 144, and cases in note 149.

MASTER AND SERVANT — ASSUMPTION OF RISKS BY SERVANT. — A servant not only assumes the ordinary risks and perils of his master's employ, but also all other risks and perils discernable by ordinary observation: *Keas v. Detroit etc. Mills*, 66 Mich. 277; 11 Am. St. Rep. 492, and note 502.

TRIAL. — The ruling of a court based upon an erroneous reason is not a ground for reversal, when for a good and valid reason the same ruling would have been correct and proper: *People v. Central etc. R. R. Co.*, 76 Cal. 29.

RUNGE v. FRANKLIN.

[72 TEXAS, 585.]

LIBEL — PRIVILEGED PROCEEDINGS. — Proceedings in courts of justice, legislative proceedings, and petitions and memorials to legislatures are absolutely privileged, and cannot be made the basis of an action for libel.

PRIVILEGE, WHEN ABSOLUTE, IS COMPLETE DEFENSE to an action for libel, and cannot be rebutted or overcome by evidence that the publication was false and malicious.

PETITION FOR LIBEL MUST SET OUT VERY LANGUAGE RELIED ON as libelous, and not merely the substance and meaning of the language.

LIBEL. The opinion states the case.

McLemore and Campbell, and George E. Mann, for the appellant.

Waul and Walker, for the appellees.

COLLARD, J. This is a suit for libel brought by Julius Runge, the appellant, against Joseph Franklin and others. It is predicated upon alleged defamatory matter contained in a petition filed by appellees in the district court of Galveston County against the Island City Ice Company, a corporation in the city of Galveston, having the usual officers, appellant being one of the directors, and the appellees being owners of much less than one half the stock. The bill declared to be libelous attacks the management of the company, alleging that it had been fraudulently conducted by the president, with the assent and approval of the directors; it asks for injunction to prevent sale or other disposition of the property, and the appointment of a receiver to wind up the affairs of the company. Only a part of the allegations of the bill are selected and declared on as libelous.

Plaintiff alleges that the bill was false and malicious, and that the suit was brought by defendants, when they were fully advised that there was no cause of action against plaintiff or right of petition, as a libelous cover and device under which to attack and injure the good name and fame of plaintiff as a man and a director, and to injure him by depreciating his stocks in several corporations of which he is director. He further alleged that after he had filed his affidavit in court specifically denying each and all the allegations of the bill, "defendants, on February 11, 1886, caused the same to be published in the Galveston News, a newspaper having an extensive circulation in the city of Galveston and throughout the state of Texas, repeating through the columns of the News the said libelous matter; in a certain part thereof was and is contained in tenor as follows: 'Hereby annexed, marked exhibit A, and made a part of this petition.'"

It is further alleged that after defendants had vented their spleen "by publishing their said libelous allegations in said petition and said newspaper, and under pretext of a suit, accomplished their wicked and malicious purpose of injuring plaintiff in character, business, and property, they then dismissed their pretended suit, paying the costs of court," before the demurrers to the same were acted on, which demurrers were alleged to show that in truth and in fact the bill set up no cause of action or basis of relief against the Island City Ice Company. The plaintiff was not made a defendant in the bill asking the appointment of a receiver.

The exhibit A filed as containing the matter published in the News is not a copy of the petition or its allegations in form, but is a somewhat condensed report of the same, and substantially restates the alleged libelous allegations of the bill extracted and copied in plaintiff's petition herein as well as other allegations not extracted nor declared on by plaintiff.

Defendants filed a general demurrer to the petition, and special exceptions, among which was one that the publication complained of was privileged, being by petition to a court of competent jurisdiction for injunction and to appoint a receiver for the Island City Ice Company. The court sustained the exceptions, and plaintiffs declining to amend, the cause was dismissed. The case comes here by appeal from this judgment of dismissal, with various assignments of error calling in question the correctness of the court's ruling.

The first and most important question raised by the assign-

ments of error is, Were the allegations set out and declared on as libelous privileged, contained as they were in a petition or bill for injunction and for the appointment of a receiver, and so far privileged that an action for libel cannot be maintained upon them, notwithstanding they are false and malicious and were made under cover and pretense of a suit without right?

The object of the bill was to prevent a sale or other disposition of the property of the ice company at a sacrifice, to appoint a receiver, and have the business wound up. It does not appear to us that the allegations declared on as libelous were irrelevant, or impertinent, or foreign to the end in view. It gives a history of alleged unlawful acts of the officers, assented to by the directory, plaintiff in the suit being one of the directors, in order to show that there was a concerted scheme among them to reduce the value of the stock and enable them to buy it in and control the company's affairs, and finally sell out its property to pay a doubtful debt for their own benefit, and thus effectually destroy all the interests of the small share-holders. It does not go outside of pertinent matters to make charges against the persons alleged to be leagued together to accomplish such design. It denominates the acts complained of as "a fraud," "a wrong," and "an injury," sufficient to invoke the equity powers of the court, and to authorize the relief sought. The bill was filed in a court of competent jurisdiction.

The demurrer and exceptions to plaintiff's suit admit that all the allegations declared on in the bill were maliciously false. There are two classes of privileged publications,—absolutely privileged and conditionally privileged. It is the occasion on which any publication is made that gives it privilege. Proceedings in courts of justice, legislative proceedings, and petitions and memorials to legislatures are said to be absolutely privileged: Townshend on Slander and Libel, sec. 209, and note 2, and secs. 217, 221; Starkie on Libel and Slander, sec. 669, top p. 676.

Where the privilege is conditional only, it is a *prima facie* defense to the action, but such defense may be overcome and rebutted by proof of actual malice and the falsity of the charge. The cases of *Holt v. Parsons*, 23 Tex. 9, 76 Am. Dec. 49, and *Behee v. Missouri Pac. R'y Co.*, 71 Tex. 424, are cases of conditional privilege only: *Bradstreet Co. v. Gill*, 72 Id. 115; *ante*, p. 768.

Where the privilege is absolute, it is a complete defense, and

cannot be rebutted or overcome by evidence that the publication was false and malicious. In *Harstock v. Reddick*, 6 Blackf. 255, where there had been accusation made by affidavit before a magistrate, charging plaintiff with obtaining goods under false pretenses, the court declared the law to be that the person making such an affidavit was not subject to suit for libel therefor. The court said: "It makes no difference whether the charge be true or false, or whether it be sufficient to effect its object, if it be made in the due course of a legal or judicial proceeding, it is privileged, and cannot be the foundation of an action for defamation."

In *Strauss v. Meyer*, 48 Ill. 386, the libelous charges were made in a bill in chancery for injunction to prevent the execution of a trust in which it was alleged that the trustee's "general character for honesty was bad," and that he was an unfit and improper person to execute the trust. The court upheld the doctrine in *Harstock v. Reddick*, *supra*, and said: "Numerous other authorities might be cited if this were a doubtful question, but reason as well as authority fully sustain the rule. If it were not so, in almost every vigorously contested case one of the parties would render himself liable to an action for libel": *Cook v. Hill*, 3 Sand. 341.

Garr v. Selden, 4 N. Y. 93, is to the same effect. The scandalous matter was contained in an affidavit filed in a judicial investigation. In reference to it, the court say: "If the matter of the affidavit were pertinent or material to the motion, the law will not allow its truth or innocence to be drawn in question in an action for libel. It would not in that case be necessary to deny malice, as the law does not permit a party to allege in this form of action that the publication was false and malicious." Other authorities might be cited, bearing more or less directly upon the point, in support of the rule that proceedings in courts are absolutely privileged, but we deem it unnecessary to discuss them. The authorities are by no means uniform in support of the rule, some holding that the privilege of a pleading in a court of justice is only a *prima facie* privilege, and others qualifying the general rule to some extent. In one case where the accusation was that notes had been fraudulently altered with intent to defraud and swindle, upon which an action for libel was brought, Chief Justice Marshall sustains the privilege, but says: "That words spoken or written in the course of justice, and pertinent to a legal proceeding within the jurisdiction of the tribunal, are

not actionable, though they be false, unless the proceedings were resorted to merely for the purpose of conveying the scandal, and as a cover for the malice of the party, and not in good faith as a remedy for the assertion of a right or the redress of a wrong": 11 B. Mon. 48.

We think the qualification made to the rule in the foregoing case and similar ones unsound. It destroys the distinction; it practically puts proceedings of the courts upon the same footing as other conditional privileges. If pleadings are shown to be false and malicious, it might well be concluded by a jury that they were employed as a cover and vehicle of defamation. The proof that would establish the facts of malice and falsity would also establish the other fact of a fictitious suit, and so there would be an end of the privilege as claimed. The distinction would be lost altogether. Mr. Townshend, in his work on slander and libel, says: "The right of appealing to the civil tribunals is more extensive than the right of appealing to the criminal tribunals; for as to the former, every one has the right, with or without reasonable cause for so doing, to prefer his complaint, and whatever he may allege in his pleading as or in connection with his ground of complaint can never give a right of action for slander or libel. . . . The rule as thus laid down has been doubted by some, and it has been said that if the tribunal to which the complaint be made has no jurisdiction of the subject-matter, or if the defamatory matter be irrelevant to the matter in hand, or if the party complaining or defending maliciously insert defamatory matter in his pleading, that in such cases the party aggrieved may maintain his action for slander or libel. Notwithstanding the *dicta* to the contrary, we believe the better and the prevailing rule to be, that for any defamatory matter contained in a pleading in a court of civil jurisdiction no action for libel can be maintained. The power possessed by the courts to strike out scandalous matter from proceedings before them, and to punish as for contempt, is considered a sufficient guaranty against the abuse of the privilege; but whatever may be the reason, it seems certain that where there is a perversion of the privilege the policy of the law steps in and controls the individual right of redress": Townshend on Slander and Libel, sec. 221.

We adopt the foregoing as expressing our views upon the question. We believe it is and ought to be the law that proceedings in civil courts are absolutely privileged. Citizens

ought to have the unqualified right to appeal to the civil courts for redress without the fear of being called to answer in damages for libel.

Where property is attached upon false charges, or where there is a malicious prosecution in a criminal court, the law affords ample remedies for the wrong done, but not by a suit for libel. No property was seized in the case at bar, and we are of opinion the filing of the bill for injunction and appointment of a receiver gave plaintiff no cause of action for libel or anything else: *Johnson v. King*, 64 Tex. 232; *Smith v. Adams*, 27 Id. 30; *Haldeman v. Chambers*, 19 Id. 53.

We have now to consider the report in the *Galveston News*. It is alleged to be a repetition of the allegations in the bill; it is filed with the petition and made a part of it; it contains a report of the suit, its object, the charges made, some of which are not declared on as libelous. The petition does not point out any particular part of it as libelous, except by declaring it to be a repetition of matter published in the court proceeding. It is not clear that the plaintiff intended to declare on it as a distinct cause of action, as nothing in it is set out in *hæc verba*, as required in petition for libel: *Bradstreet Co. v. Gill*, 72 Tex. 115; *ante*, p. 768; it is very probable it was mentioned as mere matter of aggravation. The only way in which the report in the *News* is alleged is that the slanderous matter before set out was repeated by publication in the *News*.

We do not think it would be correct pleading to borrow from former allegations, and so set up a distinct and independent cause of action; but if it could be done, the filed exhibit showing what was published in the paper does not verify the allegation that it was a repetition of the matters before alleged. On the contrary, it is a synopsis of the matter before alleged in different language, and contains much more matter of a slanderous character connected with the bill. The very language relied on as libelous must be set out in a petition for libel, not the substance and meaning of the language. The office of the innuendo is to show the effect and meaning of the language: *Bradstreet Co. v. Gill*, *supra*. The cause of action consists in the language written.

Again, if the counts as to the newspaper publication were relied on as an independent cause of action, they are insufficient for the purpose, because they do not lay the basis for damages as to amount resulting from this publication alone.

It is connected and blended with the alleged wrong of publishing by the filing of the bill in court, and the prayer is for ten thousand dollars on account of "the several grievances aforesaid." There is no measure or limit of damages set up or claimed for the particular grievance by the newspaper publication. The court is not advised as to what part of the ten thousand dollars claimed as special damages results from the newspaper publication, and could not say where a verdict should stop, or what amount it might reach for this distinct cause of action, if it be one. The verdict must respond to the issues, and the judgment must conform to the pleadings: R. S., arts. 1327, 1335. Upon this count there is no guide for either. The discussion of this question may have been needless, for, as before said, the allegations were probably intended as matter of aggravation. We thought it best to notice it, lest it might be supposed we had overlooked it. If it was intended as an additional cause of action, it was bad on general demurrer, and the court did not err in so holding.

We conclude that the judgment of the court below should be affirmed.

LIBEL. — Petition in a libel suit must put the court in possession of libelous matter, the language used, and innuendoes necessary to explain the meaning of the libelous language: *Bradstreet Co. v. Gill*, 72 Tex. 115; *ante*, p. 768, and note.

LIBEL. — PROCEEDINGS IN A COURT OF JUSTICE are privileged: *Hunkel v. Vonciff*, 69 Md. 179; 9 Am. St. Rep. 413, and note 419 et seq.; *Shadden v. McElhove*, 86 Tenn. 146; 6 Am. St. Rep. 821, and extended note 825-828; *Barrows v. Bell*, 7 Gray, 301; 66 Am. Dec. 479, and note; *Lawson v. Hicks*, 33 Ala. 279; 81 Am. Dec. 49; *Cincinnati etc. Co. v. Timberlake*, 10 Ohio St. 548; 78 Am. Dec. 285; *Aldrich v. Press Printing Co.*, 9 Minn. 133; 86 Am. Dec. 84.

MOODY'S HEIRS v. MOELLER.

[72 TEXAS, 635.]

LIMITATION — PRESUMPTION IN SUPPORT OF JUDGMENT. — Where a defendant pleads the ten years' limitation, and the record shows that he had occupied the land sued for with exclusive possession since 1873, and that such possession was "continuous, adverse, and peaceable to this date," but the record does not disclose the date of the commencement of the suit in which judgment was rendered in 1886, it will be presumed, in support of a judgment of the court sustaining the defense of the statute of limitations of ten years, that the possession was peaceable until the commencement of the suit, and that the petition was filed more than ten years after the adverse occupancy began.

RUNNING OF STATUTE OF LIMITATIONS IS NOT STOPPED BY COVERTURE OR MINORITY of the heirs after it has commenced against the ancestor.

MARSHAL'S SALE OF LAND, WHEN VOID.—A marshal's sale of land under execution from a United States court, made before the door of the United States court-house, and not before the door of the court-house of the county in which the land is situated, is void, is incapable of ratification, and may be attacked collaterally.

MERE ACQUIESCENCE OF DEFENDANT IN EXECUTION IN VOID JUDICIAL SALE gives no validity to the sale.

TRESPASS to try title. The opinion states the case.

Fly and Davidson, and J. L. Hill, for the plaintiffs in error.

C. S. Carner, for the defendants in error.

GAINES, A. J. This is an action of trespass to try title brought in the court below by plaintiffs in error as the heirs of J. A. Moody against defendants in error to recover a parcel of land in the city of Victoria, known as block 230. The defendants each claimed a separate parcel of the block, and disclaimed as to the remainder. They pleaded not guilty and the statute of limitations. The cause was submitted to the judge without a jury, and he gave judgment for the defendants.

Both plaintiffs and defendants claim title under the city of Victoria,—the plaintiffs under a sheriff's deed to their ancestor made in 1849, the defendants under a sheriff's deed made to Valentine Moeller, one of defendants, in 1868.

It was admitted on the trial that J. A. Moody, plaintiffs' ancestor, died on March 6, 1874, and it is admitted in the statement of facts "that defendants proved occupancy and exclusive possession of all the block sued for herein since February, 1873, continuous, adverse, and peaceable to this date." We presume it is meant that the possession was peaceable until the commencement of this suit, the date of which the record does not disclose. We infer, however, that the petition was filed more than ten years after the adverse occupancy began. There is a bill of exceptions, which shows that the court sustained the defense of the statute of limitations of ten years, and in the absence of the date at which the petition was filed this inference should be indulged in support of the judgment. The trial was not had until May, 1886.

The plaintiff's ancestor having died after the adverse possession commenced, the statute of limitation continued to run, notwithstanding any disability of coverture or minority that may have existed on part of any one or more of his heirs. In order, therefore, to obviate the apparent bar of the statute,

the plaintiffs offered in evidence a judgment in favor of the United States against J. A. Moody and another, in the district court of the United States of the eastern district of Texas, rendered in 1867, and execution upon the judgment with the return of the marshal showing a levy upon the land in controversy; an order of sale in pursuance of such levy, together with a return and marshal's deed showing a sale of the land to the United States and a conveyance in accordance therewith. The sale was made on the third day of November, 1868, "in front of the United States court-room in Galveston." The marshal's deed was not executed until the 10th of January, 1884. The delay, it seems, was caused by an offer on part of Moody to settle or compromise the judgment.

In connection with the foregoing evidence the plaintiffs offered a deed from the United States, dated December 29, 1884, conveying the land to them in consideration of the payment by them of the claim of the government against their ancestor. All this evidence was excluded by the court upon objection by defendants. This ruling of the court was excepted to at the time, and is now assigned as error.

The ground of objection to the evidence was, that the sale by the marshal was made at a place not authorized by law, and was therefore void. The question of the validity of a sale by a marshal under an execution from a United States court, made before the door of the United States court-house, instead of the door of the court-house of the county where the land is situated, came before this court in the case of *Sinclair v. Stanley*, 64 Tex. 67, and it was there held that such a sale was "not only voidable, but void." A voidable sale passes the legal title subject to be voided by a direct proceeding for that purpose, and it is not subject to a collateral attack. It may be ratified. But a void sale conveys no title, is incapable of ratification, and may be shown to be a nullity, even in a collateral proceeding. In all the cases cited by appellants' counsel to support a contrary ruling, the sales were held to be voidable, and not void.

There was evidence tending to show that plaintiffs' ancestor acquiesced in the sale of his land by the marshal, and appellants insist that because of such acquiescence the sale was made valid. They cite, in support of this proposition, *Brown v. Christie*, 27 Tex. 73; 84 Am. Dec. 607; *Ayers v. Duprey*, 27 Tex. 594; 86 Am. Dec. 657; *Howard v. North*, 5 Tex. 299; 51 Am. Dec. 769; *Peters v. Caton*, 6 Tex. 554; and

Sydnor v. Roberts, 13 Tex. 598; 65 Am. Dec. 84. *Howard v. North, supra*, is the only one of these cases in which the sale was held to be void, and it was there decided merely that if the owner of land sue to set aside a void sheriff's sale he must pay back the purchase-money. None of these cases give any countenance to the doctrine that the mere acquiescence by the defendant in execution in a void sale of his land made by the sheriff will give validity to the sale. It follows that the court did not err in excluding the evidence of the marshal's sale offered by plaintiffs. It did not show that any title passed by it to the United States or that the government had any title which passed by its deed to them. Nor did it show any bar to the operation of the statute of limitations. It was not an obstacle to a suit for the recovery of the land by plaintiffs' ancestor in his lifetime or by them after his death. It is too plain for argument that if plaintiffs had brought suit for the recovery of the property in controversy even before the execution of the deed of the United States to them the defendants could not have set up the claim of the government as an outstanding title to defeat the recovery.

This renders it unnecessary to consider the question whether or not the statute would have run in favor of defendants if the title had been in the United States.

Upon the uncontroverted evidence introduced in the case, the defendants showed title by limitations. That offered and rejected was properly excluded, since if it had been admitted it could not have been looked to for any purpose.

The judgment is therefore affirmed.

STATUTE OF LIMITATIONS, once put into operation, continues to run, notwithstanding subsequent disabilities: *Doyle v. Wade*, 23 Fla. 90; 11 Am. St. Rep. 334, and cases cited in note 342.

PRESUMPTIONS. — Every material fact not found by the court below must be presumed in favor of a judgment: *Jones v. Adams*, 19 Nev. 78; 3 Am. St. Rep. 788; *Bess v. Southworth*, 71 Tex. 765; 10 Am. St. Rep. 814.

JUDICIAL SALES. — Notice must be given of the exact place of sale: *Note Hoffman v. Anthony*, 75 Am. Dec. 709, 710.

JUDICIAL SALES. — A sale of real estate under execution made on a day other than the day prescribed by statute is absolutely void: *Loudermilk v. Corpening*, 101 N. C. 649.

VOID JUDICIAL SALE under which third parties have acquired rights will not be set aside at the instance of the judgment creditor, where he may reach other property of the debtor sufficient to satisfy his judgment: *Hollcraft v. Douglass*, 115 Ind. 139.

WESTERN UNION TELEGRAPH CO. v. BROESCHE.

[72 TEXAS, 654.]

TELEGRAPH COMPANY NEED NOT BE INFORMED THAT SENDER OF MESSAGE IS ACTING AS AGENT for another person, who pays the charges, and for whose benefit the transmission of the message is sought, where it is not shown that the agents of the company would have done more or acted differently under the contract if they had known that the sender was the agent of such other person.

TELEGRAPH COMPANY CANNOT AVOID LIABILITY FOR FAILURE TO DELIVER MESSAGE by showing that the office at the place of delivery was closed at the time when the message was received for transmission.

MENTAL SUFFERING MAY BE CONSIDERED AS ELEMENT OF DAMAGE in an action for the non-delivery of a telegram, the wording of which showed that it demanded prompt delivery.

STIPULATION REQUIRING TELEGRAPHIC MESSAGE TO BE REPEATED IS NO DEFENSE to an action to recover damages for delay or failure in delivering the message.

TELEGRAPH COMPANY IS LIABLE FOR SUCH DAMAGE AS IS DIRECT AND NATURAL RESULT of its failure to deliver a message intrusted to it for delivery, without regard to the degree of its negligence, where the message on its face discloses the necessity for its prompt transmission and delivery.

VERDICT WILL NOT BE SET ASIDE FOR EXCESSIVENESS ALONE in a case where mental anguish or distress is an element of actual damage, for the estimation of which the law furnishes no rule, unless it appears that the jury have acted from passion, prejudice, or other improper influence.

ACTION for negligence. The opinion states the case.

Stemmons and Field, for the appellant.

Bassett, Muse, and Muse, for the appellee.

ACKER, J. Appellee carried his wife from their home near Burton to Austin for medical treatment, Dr. Hons, their family physician, accompanying them. The wife died at Austin on Sunday, July 17, 1887, and Dr. Hons and appellee went to appellant's office in Austin between six and seven o'clock, P. M., on that day, and delivered to appellant the following message:—

"Mrs. Broesche is dead; will bring corpse on train to-night.

"J. M. HONS."

This telegram was addressed to appellee's brother-in-law, Hoffman, at Burton. Appellee paid the charges for transmitting this message, and left Austin with his wife's body that night by train, arriving at Burton about 1:30, A. M., on the 18th of July. The message was not delivered until about 8:30, A. M., the next day after it was deposited with appellant's agent in Austin, and some hours after the arrival of the corpse. This

suit was brought by appellee to recover damages for the alleged negligent delay in delivering the telegram.

The trial was by a jury, and resulted in verdict and judgment in favor of appellee for \$1,168, from which this appeal is prosecuted.

The court charged the jury to the effect that if they found that Hons delivered the telegram to appellant's agent in Austin, as alleged, they would then find whether or not, in so delivering it, Hons acted on behalf of appellee, and at his request, and that if they found Hons did not so act, they should return a verdict for appellant.

It is insisted that the court erred in giving the charge in this, that it fails to submit the question whether appellant had notice that Hons was acting as appellee's agent in contracting for the delivery of the message. No special instruction was requested to cure the alleged omission here complained of. Besides, we are of opinion that it was immaterial whether appellant was notified that Hons was acting as agent for appellee or not. We cannot see how this could have affected the rights or influenced the conduct of appellant's agents. Appellee and Hons were together in the presence of the agent to whom the message was delivered at Austin. Appellee paid the charges for transmitting the message. The operator to whom the message was delivered testified that he knew from the wording of the message that it demanded prompt delivery. Conceding that appellant was not informed that Hons was acting as agent for appellee, we are unable to understand how the lack of this information affected in any way the conduct of appellant's agents. It does not appear that they would have done more or acted differently under the contract: Story on Agency, secs. 418, 420. We think, however, that appellant was sufficiently informed of the agency of Hons.

We think there was no error in the omission in the charge complained of by the third and fourth assignments of error.

The court charged the jury to the effect that the fact that appellant's office at Burton was closed at the time its agent at Austin received the message for transmission would be no defense for failing to transmit and deliver the message, and it is contended that the court erred in this charge.

We think the court did not err in giving this charge. The contract to transmit the message was made by appellant through its agent, who was fully authorized and empowered to make it. We do not think appellant can excuse its failure

to perform the contract upon the ground that another one of its servants, acting under authority from appellant, had rendered the performance of the contract impracticable.

It is also contended that the court erred in charging that the jury might take into consideration mental anguish and suffering as elements of damages, if they should find for appellee. The point here presented had been ruled against appellant by several decisions of this court: *Stuart v. Western Union Tel. Co.*, 66 Tex. 581-586; 59 Am. Rep. 623.

It is also contended that the message having been written on a printed blank containing a stipulation that appellant would not be liable in damages for delay in transmitting or delivering the message beyond the cost of transmitting, unless it was repeated, the court should have charged the jury that if they found that the message had not been repeated, then they should return a verdict for appellant. We think the court did not err in refusing to give the special charge asked by appellant upon the stipulation contained in the printed blank. It has been decided that the stipulation requiring messages repeated cannot be invoked in defense of an action to recover damages for delay or failure in delivering the message: *Gulf etc. Ry Co. v. Wilson*, 69 Tex. 739.

We do not think that appellee's right of recovery was dependent upon the jury finding appellant guilty of gross negligence, and we think the court did not err in refusing the special charge requested by appellant to that effect. Negligence by appellant in failing to deliver the message, without regard to the degree of such negligence, would render it liable for such damage as was the direct and natural result of such failure to deliver: *Gulf etc. Ry Co. v. Wilson*, *supra*.

Appellant requested the court to instruct the jury to the effect that appellee could not recover damages by reason of his failure to accomplish any purpose not shown by the face of the message, unless appellant had notice of such exterior purpose at the time the contract was made. The special instruction was refused, and this is assigned as error.

The court charged the jury that appellee could only recover such damage as was the direct and natural result of the failure to transmit and deliver the message. The operator at Austin to whom the message was delivered testified that he knew from the message that appellee's wife was dead, and that they expected to convey her body to Burton by the train that night, and that unless the telegram was delivered the

evening he received it, the corpse would reach Burton before the telegram.

The purpose of appellee in informing Hoffman of the death, and the fact of conveying the corpse to Burton by train, was too obvious to require explanation. We think the special charge asked and refused was not called for, nor authorized by the facts, and that the court did not err in refusing to give it.

It is also contended that the verdict is excessive; but under the previous decisions of this court we cannot say that it is. Mental anguish or distress being an element of actual damage for which the law furnishes no rule for estimating, its measure is left to the discretion of the jury. Unless it appears that the jury have acted from passion, prejudice, or other improper influence, the verdict will not be vacated on the ground of excessiveness alone. We are of opinion that the judgment of the court below should be affirmed.

TELEGRAPH COMPANIES. — WHAT ARE THE PROPER ELEMENTS OF DAMAGE in actions against telegraph companies for failure to send or deliver messages: Extended note to *Western Union Tel. Co. v. Cooper*, 10 Am. St. Rep. 778-790; compare also *Pepper v. Telegraph Co.*, 87 Tenn. 554; 10 Am. St. Rep. 699, and note 711; *Western Union Tel. Co. v. Munford*, 87 Tenn. 190; 10 Am. St. Rep. 630, and note 634.

VERDICT WILL NOT BE SET ASIDE because it is claimed to be excessive, unless the amount is such as to warrant the belief that the jury were influenced by prejudice or partiality in awarding the damages: *Virginia et. Ry Co. v. White*, 84 Va. 498; 10 Am. St. Rep. 874, and note 882.

CASES
IN THE
SUPREME COURT OF APPEALS
OF
WEST VIRGINIA.

BAILEY v. GARDNER.

[21 WEST VIRGINIA, 94.]

WIFE IS NOT ENTITLED TO HER EARNINGS AS AGAINST CREDITORS of her husband, and real estate purchased with such earnings is subject to his debts, notwithstanding an agreement or understanding between him and her that the earnings were to be hers. And if upon the real estate so purchased with her earnings she puts valuable improvements with means not furnished by her husband, his creditors may subject the whole property, including the improvements, to the payment of their judgment.

SUIT to enforce a judgment lien. The opinion states the case.

C. Hedrick and W. A. Quarrier, for the appellants.

Knight and Couch, for the appellees.

JOHNSON, President. This is a suit in chancery, brought in 1884, in the circuit court of Kanawha County, to enforce a judgment lien. The bill alleges the recovery of a judgment for \$697.05, with interest and costs, in favor of the plaintiffs against the defendant T. J. Gardner; that said judgment is wholly unpaid, and is a subsisting lien on all the real estate of the said defendant; that said Gardner is the owner of two certain lots of ground near the mouth of Campbell's Creek, in said county; that the said lots were purchased and paid for by said Gardner, and procured to be conveyed to his wife, Catherine Gardner, in fraud of his creditors; and that said Gardner, out of his own means, has expended a large sum of money in building upon and otherwise improving said lots.

They pray that said conveyance be declared void as to their judgment, and the said lots subjected to the payment thereof. The defendants answered the bill, denying the fraud charged, and averring that "both of said lots were paid for by the defendant Catherine Gardner, partly by money earned with her own hands, and partly by money lent to her by her friends and relatives; and the improvements and buildings on the property were paid for in the same manner."

It is a fact found in the cause that the said Catherine Gardner contracted for and bought the land mentioned in the bill from Joel S. Quarrier and wife in the year 1880, and that she paid two hundred dollars for the land; that she obtained the two hundred dollars which she paid for the land by taking in washing, sewing, and making and selling carpets,—in other words, by her earnings while married to the defendant T. J. Gardner, and while living with him; that before and at the time of the purchase she had no separate estate, unless her earnings can be considered such, and at the time of said purchase the said Gardner was largely in debt; that the note on which the judgment was recovered had been due for over six years; and that she knew of her husband's indebtedness. It may be regarded as a fact established that at the time this purchase was made T. J. Gardner was insolvent. The purchase-money for the lots, two hundred dollars, was earned by the wife during coverture. The contract for the purchase was made in September, 1880. The improvements on the property cost sixteen hundred dollars. Of this, fourteen hundred dollars was put on it for Mrs. Gardner by her son, W. H. Gardner, and two hundred dollars Mrs. Gardner borrowed from her son-in-law, John W. Bracken; but it clearly appears that not one dollar in money or labor of the debtor, T. J. Gardner, went into the said property. The court held the deed fraudulent and void as to the plaintiffs' demand, and ordered the property sold not to pay the two hundred dollars, with interest from the first day of September, 1880, but to pay the plaintiffs' judgment, interest, and costs, amounting to over eight hundred dollars. From this decree Catherine Gardner appealed.

This court, in *Jones v. Reid*, 12 W. Va. 350, 29 Am. Rep. 455, without citing authority, recognized the universally conceded fact, that at common law the earnings of the wife are absolutely the property of the husband; but founding its decisions in that case upon *Slannings v. Style*, 3 P. Wms. 334, as well as upon a number of other authorities cited, held where, with the

husband's consent, the wife earns money, with the agreement or understanding between them that it is to be hers, and the rights of creditors do not intervene, it will, in a court of equity, be given to her, as against the devisees or the distributees of the husband. The question whether, under such circumstances, in a court of equity, she would be entitled to her earnings as against her husband's creditors was expressly left undecided in that cause. That question we are compelled to decide here.

It sufficiently appears in this cause that there was an agreement or understanding between T. J. Gardner and his wife that the two hundred dollars paid for the lot, and which were the produce of her own earnings, were to be hers. Could she hold such earnings as against her husband's creditors? We have made diligent search for precedents, and, except in the state of New Jersey, have not found a single authority which holds that, in the absence of a statute authorizing it, the wife, with her husband's consent, can, as against his creditors, hold her earnings. In New Jersey the decisions are not uniform.

In *Stall v. Fulton*, 30 N. J. L. 430, it was held that the earnings of the wife, upon express promise to pay her, belong to her, and not to her husband, until he does some act with intent to reduce them into possession, and if he dies first, they survive to the wife; and if, with such proceeds, she buys land, and the deed is made to her before the conversion by the husband, the land belongs to her, and cannot be seized and sold by his creditors under judgments against him; that the husband is not obliged to, nor is he guilty of any fraud against creditors if he does not, convert to his or their use the earnings of the wife. This decision was rendered in 1864; yet in 1866 (*Cramer v. Reford*, 17 N. J. Eq. 367; 90 Am. Dec. 594), it was held that the wife's earnings and the avails of her labor during coverture belong to her husband, and he cannot, as against his creditors, give or agree to give them to her; that real estate purchased with the wife's earnings during coverture belongs to the husband, and is subject to be taken for his debts.

In *Quidort's Adm'r v. Pergeaux*, 18 N. J. Eq. 472, it was held that a husband may, as against his creditors, allow his wife to have, for her separate use, the earnings of herself and of the labor of their minor children. In this case, however, it appears that the wife had a separate estate outside of her earnings.

In *National Bank v. Sprague*, 20 N. J. Eq. 1, it was decided that although a husband may give to the wife her services and earnings as against his creditors when she carries on a separate business, without his assistance, with her own means and on her own account, yet in all cases where a business is carried on by a husband and wife in co-operation, and the labor and skill of the husband are contributed and united with those of the wife, the business will be considered as that of the husband, and not of the wife, and the proceeds will not be protected for her as against his creditors; that the fruits of the wife's labor and skill, under such circumstances, are not her separate property, within the terms and intentions of the act for the better securing the property of married women.

In *Peterson v. Mulford*, 36 N. J. L. 481, it was decided that a husband may permit a wife to labor for herself, and to appropriate to her own use the proceeds of her own labor, when received by her; and that such permission or gift is good against the creditors of the husband, if such proceeds have not actually been reduced into his possession.

As opposed to the New Jersey decisions are the following, among numerous others: *Coleman v. Burr*, 93 N. Y. 17; 45 Am. Rep. 160; *Freeman v. Orser*, 5 Duer, 476; *Goss v. Cahill*, 42 Barb. 310; *Smart v. Comstock*, 24 Id. 411; *Adams v. Curtis*, 4 Lans. 164; *Raybold v. Raybold*, 20 Pa. St. 308; *Hallowell v. Horter*, 35 Id. 375; *Bucher v. Ream*, 68 Id. 421; *Whiting v. Beckwith*, 31 Conn. 596; *Hinman v. Parkis*, 33 Id. 188; *Elliott v. Bently*, 17 Wis. 591; *Laing v. Cunningham*, 17 Iowa, 513; *Duncan v. Roselle*, 15 Id. 503; *Connor v. Berry*, 46 Ill. 371; 95 Am. Dec. 417; *McMurtry v. Webster*, 48 Ill. 124; *Johnson v. Johnson*, 4 Harr. (Del.) 171; *Henderson v. Warmack*, 27 Miss. 835; *Sharp v. Maxwell*, 30 Id. 589; *Apple v. Ganong*, 47 Id. 189; *Simmons v. Kincaid*, 5 Sneed, 450; *Pinkston v. McLemore*, 31 Ala. 308; *Merriwether v. Smith*, 44 Ga. 541; *Dold v. Geiger's Adm'r*, 2 Gratt. 99; *Vance v. McLaughlin's Adm'r*, 8 Id. 289; *Campbell v. Bowles*, 30 Id. 652.

These authorities regard the wife's earnings as choses in action, and that by virtue of the marriage, at common law, they belong to the husband, as much as any other property which he acquired by virtue of the marriage, and that, even before they were reduced to possession, he had the right to them, and could assign them, or if the right of creditors did not intervene, he had the right to give them to his wife, or allow her to receive them; but that, as against his creditors,

she had no more right to such earnings than she had to any other property of his. In the language of the court in *Pinkston v. McLemore*, *supra*, "the husband may, by gift or contract, create in his wife a separate estate in the proceeds of her own labor, the validity of such gift, as against creditors, being subject to the same rules which apply to other voluntary conveyances."

In *Dold v. Geiger's Adm'r*, *supra*, it was held that choses in action and other property to which the wife becomes entitled during coverture are liable to the claims of the creditors of the husband, and a settlement thereof upon the wife, with the assent of the husband, before being reduced into possession, will not protect such choses in action or other property from such creditors' claims.

In *Vance v. McLaughlin's Adm'r*, 8 Gratt. 289, it was held that a wife's interest as legatee in her father's estate in the hands of the executor may be subjected by the creditor of her husband by a proceeding by foreign attachment when the husband resides out of the state. But though the service of the process upon the executor creates a lien upon the wife's interest in favor of the creditor, yet if the husband dies pending the proceedings, leaving his wife surviving him, the lien of the creditor is defeated, and the property belongs to the wife. This of course was so, because in that case the interest of the wife had not yet been reduced to possession by the husband. But as he had the right to reduce it to possession, his creditors had the same right, liable to be defeated by the husband dying before it was reduced to possession.

In the case of *Campbell v. Bowles*, 30 Gratt. 652, it appeared that a deed was made to a trustee for the separate use of a married woman, and that the consideration was paid by money derived from the wife's earnings, and there was no agreement, either ante or post nuptial, that she should be entitled to her earnings, and the husband, though during the time of these earnings generally absent from home, had not deserted her. It was held that the earnings of the wife were the property of the husband, and the real estate thus purchased subject to his debts. This is settled law when there is no statute to control.

Does our statute in this respect change the common law and the general equity practice, where the rights of creditors are involved? Our statute provides that "all real and personal property theretofore conveyed directly to a married

woman, or to a trustee for her use, by any person other than her husband, as her sole and separate property, and the rents, issues, and profits thereof, shall be and remain her sole and separate property, as if she were a single woman, and the same shall in no way be subject to the control of her husband, or liable for his debts." Section 2 provides that "the real and personal property of any female who may thereafter marry, and which she shall own at the time of the marriage, and the rents, issues, and profits thereof, shall not be subject to the disposal of her husband, nor be liable for his debts, and shall be and continue her sole and separate property as if she were a single woman." The third section provides "that any married woman may take by inheritance, or by gift, grant, or devise, or bequest, from any person other than her husband, and hold to her sole and separate use, and convey and devise, real and personal property, and any interest or estate therein, and the rents, issues, and profits thereof, in the same manner and with like effect as if she were unmarried, and the same shall not be subject to the disposal of her husband, nor be liable for his debts; provided that no married woman, unless she is living separate and apart from her husband, shall sell and convey her real estate unless her husband joins in the deed or other writing by which the same is sold and conveyed." Here the important limitation "from any person other than her husband" would prevent a gift from him to her, as against his creditors, from being valid. Here in these provisions is no authority, either express or implied, to authorize a husband, as against his creditors, to agree that his wife should have her own earnings; but to make it clear that the legislature did not intend he should have such authority, we have but to look to the thirteenth section, which declares that "a married woman *living separate and apart from her husband* may, in her own name, carry on any trade or business; and the stock and property used in such trade, and the issues and profits thereof, together with her own earnings, realized from such trade, business, or otherwise, shall be her sole and separate property, and shall not be subject to the control of her husband, nor liable for his debts": Code 1868, c. 66, secs. 1-3, 13.

I have italicised parts of section 13. There certainly is, by the statute, no change made in the common-law or chancery practice as to the wife's earnings during coverture.

I agree entirely with what Dixon, J., said in *Elliott v.*

Bently, 17 Wis. 618: "It is somewhat remarkable, among the many beneficent changes recently effected by the legislation for the welfare and protection of married women that the legislature should have omitted to secure to the wife the rewards of her individual skill and labor. The real and personal property owned by her at the time of marriage, or which she may receive after marriage by gift, grant, devise, or bequest from any person other than her husband, and the rents, issues, and profits thereof, are zealously guarded, and secured to her sole and separate use. But her earnings, the proceeds of her personal labor, beyond that which is required in the discharge of the ordinary duties of the household and family, and which are most frequently the married woman's only means of acquiring property for the future support and comfort of herself and children, are left to the severe and rigorous rules of the common law, except when the husband, from drunkenness, profligacy, or other cause, shall neglect or refuse to provide for her present support, or the present support and education of her children: R. S., c. 95, sec. 4. This seems contrary to the spirit of modern legislation on the subject. If the property and its profits deserve protection from the acts or rapacity of the husband or his creditors, the earnings of the indigent, but frugal and industrious, wife and mother would seem to deserve it still more."

It is strange that our legislature did not make some provision whereby a wife might, with the consent of her husband, be entitled to her earnings, produced by her extra exertions after she had discharged all her ordinary household duties. Many a good woman toils early and late to support her sick or disabled husband and her children, oftentimes by her needle, by teaching music, or in school, and it seems very hard indeed, after she has in this way accumulated something, with which she purchases a piano or sewing-machine, necessary to assist her in performing the extraordinary duties thrust upon her of supporting the family, whose natural supporter is either unable or from sheer worthlessness refuses to discharge the obligation, to allow an old creditor of her husband to snatch it from her, and thus, it may be, visit suffering on her and her helpless children. But hard as this case and thousands like it are, no relief can be afforded except by the legislature. It is not for the courts to correct such hardships in the common law. Courts, as it is, are often charged with legislating,—with producing "judge-made law."

The learned counsel for the appellant were eloquent when in their brief they said that "the opinion of men in reference to the capacity of women to engage in and manage ordinary business affairs has undergone a great change within the last half-century. They were formerly prone to regard them very much as do the Turks, who believe that women have no souls, and restrict them to the seclusion of the harem, with its candies and coffee, cigarettes, intrigue, and insipidity. The Christian woman, at least in modern times, gets a different training, and attains a higher standard; and with a little experience shows a good capacity for business." If she is not sufficiently protected in her rights, and encouraged to put forth all her energies, in times of trial, for the protection, support, and education of her children, when he who has vowed to do all these things fails, through affliction or folly, then the legislature must afford the remedy,—the courts dare not do so; for by so doing they would burst through that barrier the respect for which gives them all their power and influence. The deed is void as to the plaintiff's judgment.

Did the court err in requiring the whole property, with the improvements, to be subjected, not to the payment of what had been diverted of the husband's means in fraud of his creditors, but to pay the whole judgment, amounting, with interest and costs, to about eight hundred dollars? In *Isham v. Schafer*, 60 Barb. 317, it was held that the law devotes all the property of a debtor, both real and personal, to the payment of his debts; and if a debtor, instead of paying his debts, uses his personal property on the real estate of another, so that it becomes a part of such realty, for the purpose of defrauding his creditors, and to prevent them from obtaining satisfaction of their demands out of his property, with the knowledge and consent of the owner of the realty, the judgment creditor may follow the property into the hands of the owner of the premises thus benefited, and fasten his judgment upon such premises, to the extent of the debtor's property therein.

In *Quidorts's Adm'r v. Pergeaux*, 18 N. J. Eq. 472, it was held that a deed taken in the name of the wife for property purchased with her separate estate is no fraud upon his creditors, even if the taking title in her name was to avoid any claim by judgment against her husband for debts which he then owed; but where the balance of the purchase-money for such property was paid out of the earnings of a business

carried on in the name of the wife, but to which the skill and labor of the husband largely contributed, such property will be decreed to be held by the wife, in trust, for his creditors, subject to her claim for the money advanced out of her separate estate.

In *Glidden v. Taylor*, 16 Ohio St. 509, 91 Am. Dec. 98, it was decided that where a wife suffers her money to be employed by the husband and blended with his earnings, so that it cannot be separated, the most favorable position she can be allowed to assume is that of a preferred creditor in equity, and as such, entitled to her money and interest.

In *Shackelford v. Collier*, 6 Bush, 149, it was decided that although a *feme covert* may acquire the possession of property as separate estate, yet if its acquisition was in consideration of the money or property of her husband which was subject to the claims of his antecedent creditors, the wife's claim will generally be made to yield to those of the creditors; that so far as the separate estate of the wife entered into the purchase and production of the real or personal property in controversy, her title thereto is valid and sustained, and as the savings of a *feme covert* out of her separate estate are hers, the products and accumulations of her separate estate must be included in estimating her present interest in said property. After securing the title and possession of the wife as to her separate estate, the residue is subjected as estate which passed to the assignee in bankruptcy.

In *Apple v. Ganong*, 47 Miss. 189, it appears that a tract of land was purchased by a wife, partly with money which she had before her marriage, and partly with her own earnings from sewing, and the deed was made to her. An execution for a debt of the husband was levied on the land, and she obtained an injunction. Simrall, J., in delivering the opinion of the court, said the code "enables the wife to purchase property with what money she had at her marriage, or which accrued to her afterwards from the income of her property, or otherwise. No matter from what source the money comes, she may so employ it, provided it is her money. If it be the gift of a stranger, it is hers. If it be derived from the husband, it is hers also, as against him, but not his creditors. That the personal earnings of the wife are not relieved by these laws from the marital rights of the husband is evidenced by the fact that the codifiers and the legislature of 1871 thought it proper to place them upon the same footing as income from

the wife's property. We are therefore of opinion that the husband has an interest in the lands in controversy in the proportion that the wife's personal gains bear to the amount of money which she had at the time of her marriage, and the proceeds of her cotton, or other separate means, compared with the aggregate cost of the land. These personal gains from her own labor, compared with the whole cost of the land, is the extent of interest of the husband which the creditors may have applied to their debt."

In *Rose v. Brown*, 11 W. Va. 122, the court held the deed to the wife, though voluntary, was not fraudulent as to the creditors of Brown, but that in fraud of creditors he diverted his means from the payment of his debts, and invested such means in said property so voluntarily conveyed to his wife, and that the creditors could charge the said real estate with the payment thereof. Again, in *Bank v. Wilson*, 25 Id. 244, this court held, where a person incurs debts for moneys advanced or loaned to him, which, with large amounts of other moneys of his own, are voluntarily and without consideration invested by him in making valuable improvements upon real estate settled upon his wife, his creditors may charge the said moneys upon the said real estate."

In this case there were sixteen hundred dollars' worth of improvements put upon the two lots purchased by Mrs. Gardner; fourteen hundred dollars of them may be regarded as a gift from her son, and the other two hundred dollars she borrowed from her son-in-law. It is a conceded fact in the cause that T. J. Gardner, the debtor, never contributed one cent to the improvement of the property. The lots cost two hundred dollars; the improvements, sixteen hundred dollars. Under the rigor of the law, the earnings of a wife belong to her husband. He gave them to her. Between them this was lawful. As to the creditors, he had no power to give them to his wife. She, without using one cent that the creditors could have the least right to touch, put sixteen hundred dollars of improvements on this property. Would it not be inequitable and unjust that the creditors, should have the right to sweep this away? We have seen if he improves her property the money thus diverted will be made a charge on the land in favor of creditors. Then, when she puts improvements on property bought with money which his creditors were in law allowed to seize, these creditors should only be allowed to subject the lot without the improvements. They are *ex æquo et bono* entitled

to have the value of the lots less the improvements; that is, to get the money that the debtor consented that his wife might take, and which the creditors were entitled to. They can either take the purchase-money of the lots, with interest thereon from the time it was paid, or they may have the value of the lots at the present time ascertained, and subject them to the payment of that sum. More than this, under the circumstances of this case, they are not entitled to receive. The lots do not belong to the creditors. They only have the right to charge them for a sum equal to their value, for their judgment. Their judgment, to this extent, may be satisfied out of the lots, unless it is paid. When this cause goes back it should be ascertained what the lots without the improvements are now worth, unless the plaintiffs are willing to accept the purchase-money and interest as the value. In either case, a decree should be entered in the court below giving a day to pay this sum, and if not paid, to subject the property as it stands, with the improvements, to the payment thereof.

But my associates do not agree with me in this view; but hold, as the deed was held fraudulent under the statute as to the creditors of Gardner, the whole property, including the improvements, is liable to be subjected to the full amount of the plaintiff's judgment. The reason for this decision on this point is given in an opinion filed by Judge Snyder, and concurred in by Judges Green and Woods. Therefore, the judgment must be affirmed.

SNYDER, J. I concur in so much of the foregoing opinion as holds that the deed from A. L. Ruffner, trustee, to Catherine Gardner of the real estate in the bill mentioned is void as to the creditors of the husband of said Catherine; but I do not concur in that portion of the opinion which exempts the improvements placed on the property since the date of the purchase by Gardner from liability for the plaintiff's debt, and confines the relief of the plaintiffs to the value of said property exclusive of the improvements. The cases referred to and relied on in said opinion to sustain the latter conclusion are not analogous to the case at bar. They simply recognize and enforce the well-settled doctrine that where no debt has been created between parties to a fraudulent transaction, and the personal property of the debtor has been merged or become a part of the real estate of another, the appropriate remedy for the creditor is to charge such real estate to the extent of the debtor's property thus made part of the realty.

According to this doctrine, it was held in *Tenney v. Evans*, 14 N. H. 343, 40 Am. Dec. 194, that a guardian could not purchase property and place it on the land of his ward to the injury of his creditors. So in *Lynde v. McGregor*, 13 Allen, 182, 90 Am. Dec. 188, where it appeared that an insolvent husband had made extensive expenditures upon lands of his wife, and had increased their value, Gray, J., said: "The amount of such increase in value, for which no consideration has been paid by the wife, and which has been added to her estate by the husband in fraud of his creditors, in equity belongs to them, and may be made a charge upon land for their benefit." The rule is general that where improvements have been placed by the debtor upon the real estate of another, both acting in fraud of creditors, they can be followed, and the realty charged in favor of the creditors with the value of such improvements: *Ross v. Brown*, 11 W. Va. 137; *Heck v. Fisher*, 78 Ky. 644; *Sexton v. Wheaton*, 8 Wheat. 229; *Bank v. Wilson*, 25 W. Va. 242.

The case before us is radically different from any of these cases, and is controlled by a very different rule of law. Here, as to the creditors, the real estate belongs to the debtor. By both the English and the American common law, improvements annexed to the freehold are deemed part of it, and they pass with the recovery of the land. Every occupant makes improvements at his peril, even if he acts under a *bona fide* belief of ownership: 2 Kent's Com. 334. The rule is founded upon the idea that the owner should not pay an intruder or occupant for improvements which he never authorized. This rigid rule of the common law was at an early period so far modified by the chancery courts that when a *bona fide* possessor of property had made permanent improvements upon it in good faith, and under the honest belief of ownership, and the real owner was, for any reason, compelled to come into a court of equity, that court, applying the familiar maxim that he who seeks equity must do equity, would compel him to pay for those improvements or industrial accessions so far as they were permanently beneficial to the estate and enhanced its value: 2 Story's Eq. Jur., secs. 799 a, 799 b; *Bright v. Boyd*, 1 Story, 478; *Jackson v. Loomis*, 4 Cow. 168; 15 Am. Dec. 347. But in respect to a *mala fide* or fraudulent occupant, the common-law rule remains in full force and unchanged; and as to such occupant a court of equity, no more than a court of law, will compel the owner to pay him for his

improvements: *Dawson v. Grow*, 29 W. Va. 333; *Lowther v. Lowther*, 80 Id. 103.

While the deed to Mrs. Gardner in this case is valid and binding between the parties to it, and as to all persons except her husband's creditors, the equitable as well as the legal estate to the property is vested in her, yet as to such creditors the deed is absolutely void, and she has never been vested with any title or estate. The first part of the preceding opinion finds and decides that this conveyance was wholly void as to the debt of the plaintiffs. This finding necessarily determines that she was a *mala fide* purchaser, and participated in the fraud by which the conveyance was made to her. It therefore inevitably follows that, she being a fraudulent purchaser, she was a *mala fide* possessor at the time she placed the improvements upon the property; and being such, she is not entitled, either at law or in equity, as against the debt of the plaintiffs, to compensation for the improvements, or to have them exempted from liability for said debt: *Core v. Cunningham*, 27 W. Va. 206. The wife in this case occupies precisely the same position to the debt of the plaintiffs that she would if, at the time she made the improvements, the plaintiffs had had a positive lien for their debt on the property, and she had notice of that fact. No one could, with any propriety in such case, contend that she would be entitled to compensation for the improvements, or to have them exempted from liability for such lien.

For these reasons, I think the decree of the circuit court should be affirmed.

HUSBAND AND WIFE — EARNINGS OF WIFE. — The common-law rule is, that a wife's earnings belong to the husband while they are living together as man and wife: *Norcross v. Rodgers*, 30 Vt. 588; 73 Am. Dec. 323; *Skillman v. Skillman*, 15 N. J. Eq. 478; 82 Am. Dec. 279; *McLemore v. Pinkston*, 31 Ala. 266; 68 Am. Dec. 167; *Cramer v. Reford*, 17 N. J. Eq. 367; 90 Am. Dec. 594; note to *Kirkpatrick v. Buford*, 76 Id. 367, 369, 370, 372; note to *Belford v. Crane*, 84 Id. 163, 164; and such earnings of the wife are subject to the husband's debts: Note to *Partridge v. Stocker*, 84 Id. 674. The property of a wife bought with her earnings while living separate and apart from her husband by reason of domestic infelicity is the separate property of the wife under the California code: *Loring v. Stuart*, 79 Cal. 200. The keeping of boarders by a married woman is such a business independent of her purely marital duties as will entitle her to a separate property in the proceeds thereof: *Gilbert v. Glenn*, 75 Iowa, 513. When a married woman has become entitled to a separate property in her earnings, property bought thereof cannot be subjected to the payment of her husband's debts: *Orr v. Bornstein*, 124 Pa. St. 311.

CLARK v. FIGGINS.

[31 WEST VIRGINIA, 156.]

PRIORITY OF CREDITOR PROCEEDING TO SET ASIDE FRAUDULENT TRANSFER.

— Where a debtor makes an assignment of his property in fraud of his creditors, they may, in a court of equity, have it set aside, and the creditor who first files his bill obtains thereby a priority, and is entitled to be first paid out of the proceeds of the sale of the property, if there are no valid prior liens.

CREDITORS ENTITLED TO PRIORITY WHEN. — Where suit is brought to enforce an assignment, and certain creditors file answers attacking the assignment as fraudulent, such answers may be regarded as cross-bills, and if they succeed, they will be entitled to the same preference as if they had filed a bill to have the assignment set aside as fraudulent. And if, upon being defeated in the court below, they alone appeal, and procure a reversal of the decree, and have the assignment declared void, they will be entitled to be first paid out of the proceeds of the property assigned, if there were no valid prior liens at the time when they filed their answers.

BILL to enforce an assignment for the benefit of creditors. The opinion states the facts.

Simms and Enslow, B. J. McCormick, and T. H. Harvey, for the appellants.

W. S. Laidley, and Payne and Green, for appellees.

JOHNSON, President. The cause was once before this court and decided (27 W. Va. 663), to which reference is made for a more complete statement. This court then reversed the decree of the circuit court, holding the deed of trust preferring creditors fraudulent in fact. The cause was remanded, with instructions to the court to hold the fund in its hands until it should be determined to whom it should be paid, and then disburse it to those entitled thereto. It was then further held that, the deed having been declared void, the fund could not go to the plaintiffs by virtue of the deed. The court below held the deed valid.

The bill was filed by Clark & Co. and others, setting up the deed, and claiming to be preferred creditors, having accepted the terms of the deed, and also set up the fact that Ruffner Brothers and others, refusing to accept the terms of the deed, had sued out attachments and prayed that a receiver be appointed, and be instructed to take possession of the goods, sell them, and bring the proceeds into court, which was done. Ruffner Brothers, Arnold and Abney, and Hurst, Purnell, & Co. alone filed answers to the bill, and attacked the deed as

fraudulent, took depositions to prove the charges in their respective answers, and the court held the deed valid, and decreed that the money should be paid to the plaintiffs who had accepted said deed. From this decree the said Ruffner Brothers, Arnold and Abney, and Hurst, Purnell, & Co. alone appealed to this court, where the decree was reversed, and the deed held fraudulent in fact, and cause remanded for the purpose above set forth.

In the circuit court the cause was heard on the mandate of this court, and referred to a commissioner to ascertain and report "the amount of all claims and debts of the plaintiffs and defendants, all the attachment cases, giving a correct statement of all dates and amounts, with an abstract of the proceedings in each case." The commissioner reported a list of all the claims, and also that the deed of assignment was executed on the second day of October, 1882, and admitted to record the next day; that the chancery cause of A. R. Clark & Co. and others, who had accepted the terms of the deed, was commenced on the twenty-sixth day of December 1882; that the attachment of Ruffner Brothers was issued on the fourth day of October, 1882, and went into the hands of the sheriff at twelve, M., of that day, and was levied on the same day; that judgment was rendered in the case on the 24th of August, 1883; that the attachment in the case was quashed on the 24th of November, 1882; that the attachment of Arnold and Abney was issued on the 4th of October, 1882, and was levied the same day. He also set out the date of the issuing and levying of all the attachments, also the dates of the recovery of the various judgments, and the dates of the issuing of the executions, and shows that several were levied on the funds in the hands of the receiver. No execution was issued until the property and its proceeds were in the hands of the court.

The record shows that all the attachments were quashed. The cause was heard on the sixteenth day of August, 1886, and the court gave the whole fund, after paying costs and commissions, to Ruffner Brothers, Arnold and Abney, and Hurst, Purnell, & Co., holding that they, being the only defendants in the court below who had attacked the deed as fraudulent, and, being defeated there, were the only parties who appealed, and were successful in having the decree reversed and deed declared fraudulent and void, were, by virtue of their diligence, entitled to be first paid; and ascertained and declared that the

whole fund would be insufficient to pay them. The decree recites that these three firms, by consent, agreed, as between themselves, there should be no priority.

From this decree, A. R. Clark & Co., Miller, Cesner, & Co., and Maddux Brothers, and others, appealed, and seek to reverse the decree, because they were the first and only creditors to attack the attachments, and bring the fund into court, before any valid lien was obtained on the goods or fund; that after the property was, at their suit, put into the hands of a receiver, where no creditor could obtain a lien, the fund should have been distributed among the creditors of Figgins who first brought the fund into court, or at least ought to have been divided *pro rata* among all the creditors, and not given to the parties whose attachments were defeated.

Did the court err in its decree? In *Wallace's Adm'r v. Treacle*, 27 Gratt. 479, it appeared that the deed of H., for land, was set aside as fraudulent, at the suit of some of his creditors, and there was a decree after the death of H. for a sale of the land, and for an account of the debts of H. and their priorities. The report shows there was one judgment against H. before the deed was made. Some of the creditors in the bill were creditors by judgment; one a creditor at large. A number came in by petition before the decree, and a number came in before the commissioners, and by petition after the decree. The court held that, in distributing the fund, it should be applied,—1. To pay the judgment recovered before the deed was made; 2. To the judgments recovered before the bill was filed; 3. To the creditors at large who joined in the bill; 4. To the creditors by petition before the death of Henderson, in the order in which their petitions were filed; 5. To all the other creditors *pro rata*.

In *Gordon v. Lowell*, 21 Me. 251, it was held that where a creditor has, through the instrumentality of a court of equity, sought out and discovered the property of his debtor, which he had before been unable to discover, and seized upon execution at law, he becomes entitled to a preference over other creditors,—to have his judgment first satisfied, even under the insolvent laws. See also *Edmeston v. Lyde*, 1 Paige, 637; 19 Am. Dec. 454; *Pallis v. Robinson*, 78 Mo. 201. Where a reconveyance is made in fraud of creditors, they, or any of them, may, in a court of equity, have the same set aside. The creditor who first files his bill obtains thereby a priority, and is entitled to be first paid from the proceeds of the sale of

the land, if there are no valid prior liens: *George v. Williamson*, 26 Id. 190; 72 Am. Dec. 203; *Bank v. Burke*, 4 Blackf. 141; *Petway v. Hoskin*, 12 Lea, 107; *Corning v. White*, 2 Paige, 567; *McDermutt v. Strong*, 4 Johns. Ch. 687; *Smith v. Lind*, 29 Ill. 24; *Lyon v. Robbins*, 46 Id. 277; *Rappleye v. Bank*, 93 Id. 396; *Clafin v. Foley*, 22 W. Va. 434; *Sweeny v. Sugar Co.*, 30 Id. 443.

In *McDermutt v. Strong*, 4 Johns. Ch. 687, Chancellor Kent said: "Though it be the favorite policy of this court to distribute assets equally among creditors *pari passu*, yet whenever a judicial preference has been established by the superior legal diligence of any creditor, that preference is always preserved in the distribution of assets by this court."

In *Smith v. Lind*, 29 Ill. 24, the court said: "There is certainly some merit in searching records, discovering property, investigating titles, and procuring sale of it, and all at the creditor's cost and expense, by which he ought to profit. It appeared, by the affidavit, that it was through the efforts and at the cost of the plaintiff a knowledge of the real estate sold was obtained; and it would be a hardship if another creditor, who has made no effort to this end, should enjoy the fruits of this diligence. Both the judgment creditors were in a position to use diligence. One only encountered the labor and expense. To him should be the reward. *Vigilantibus non dormientibus jura subveniunt.*"

In *Rappleye v. Bank*, 93 Ill. 402, Mr. Justice Sheldon said, in delivering the opinion of the court: "Although appellant might have proceeded, and have avoided the trust deed, and have subjected the estate thereby conveyed to the satisfaction of his judgment, or have had the lots sold on execution, he did not choose to assume that burden or expense. Appellee then assumed the undertaking of avoiding the trust deed, and succeeded in effecting the removal of the encumbrance, encountering all the expense and labor thereof. It is through this proceeding of appellee that this estate conveyed by the trust deed has been secured for application to the satisfaction of these judgments. Appellant now comes forward to appropriate to himself all the benefit. It does not seem just; and we think, under the equitable doctrine which courts apply in analogous cases, and the decisions in *Lyon v. Robbins*, 46 Id. 279, appellee is fairly entitled to a preference, as a reward of its diligence."

Here the three firms to whom the reward of diligence was

granted filed their answers in the court below, and were the only defendants who did so, attacking the said trust deed for fraud. They were opposed in this by the plaintiffs in that suit, who were seeking a preference by trying to show that the deed was valid. The other defendants contented themselves with standing idly by and seeing these active defendants carry on the contest at their own labor and expense. When these answers were filed, the effect, *quoad*, these defendants claimed, was the same as if they had filed a bill for the purpose of having the trust deed declared fraudulent, and they might be regarded in the nature of cross-bills. At that time there were no prior liens on the property, as all the attachments were subsequently declared void. These three firms were beaten in the court below, and decreed to pay costs with Dages & Co., Maddux Brothers, H. N. Bailey, and Allemong, Bear, & Co. Three of these parties were applied to by Ruffner Brothers, Arnold and Abney, and Hurst, Purnell, & Co. to join them in an appeal, and declined. None of the others came forward to join in the appeal. These three firms alone applied for the appeal, which was granted, and the decree reversed, and trust deed set aside as fraudulent. It seems to us that this comes, in all its circumstances, within the maxim, *Vigilantibus non dormientibus jura subveniunt*. There would be no reward to the vigilant if these parties were now compelled to step aside, and let those who fought them persistently all through the cause, in both courts, and those who stood by and did nothing, take the fruits of their labor and expense, or were compelled to divide it with them.

The decree of the circuit is correct, and is affirmed.

FRAUDULENT CONVEYANCE — PRIORITY OF CREDITORS. — The creditor who first files his petition to set aside a fraudulent conveyance obtains a priority, and is entitled to be first paid from the proceeds of a sale decreed upon the judgment obtained through his efforts: *George v. Williamson*, 26 Mo. 190; 76 Am. Dec. 203; but when two creditors sue to set aside a fraudulent conveyance and obtain a decree to that effect, the property will be decreed to satisfy the person whose lien is prior; and if the creditor who obtains the last judgment has a mortgage upon the property prior to both judgments, his mortgage lien will be preferred to the lien of the judgments: *Trimble v. Turner*, 13 Smedes & M. 348; 53 Am. Dec. 90. Where several creditors obtain judgments against a common debtor, who has made a prior conveyance, which is fraudulent as to them, such judgments are liens which are enforceable according to their priority: *Jackson v. Holbrook*, 36 Minn. 494; but compare *Lillienthal v. Hotaling*, 15 Or. 371.

RAILWAY COMPANY v. RYAN.

[51 WEST VIRGINIA, 364.]

JUDGMENT RENDERED BY JUSTICE OF PEACE WITHOUT SERVICE upon or appearance of the defendant is void; but as such judgment, even though rendered upon the verdict of a jury, may be set aside by the circuit court upon a writ of *certiorari*, the defendant cannot obtain relief against it in a court of equity.

PERSONAL DECREE AGAINST PLAINTIFF, ERRONEOUS WHEN.—Where, in a suit to enjoin a void judgment, relief is denied the plaintiff because he has an adequate remedy at law, it is error to enter a personal decree against him. The only power the court has in such cases is to dismiss the bill, with costs.

BILL for injunction. The opinion states the case.

George S. Couch and W. A. Quarrier, for the appellant.

S. Littlepage, and Kennedy and Littlepage, for the appellees.

SNYDER, J. In August, 1887, the Kanawha and Ohio Railway Company, a domestic corporation, filed its bill in the circuit court of Kanawha County, against Kate Ryan and J. T. Brodt, a justice of said county. The allegations of the bill are, that on July 1, 1887, the defendant Kate Ryan brought an action before the defendant Brodt, a justice of Kanawha County, demanding judgment for three hundred dollars; that on July 7, 1887, the action was tried by a jury, and a verdict found for three hundred dollars, on which the justice entered judgment; that the justice had no jurisdiction to render said judgment, because there was no legal service of process on this plaintiff, and it made no appearance in any manner to the action, and therefore the said judgment is utterly void. The prayer is, that the defendants be enjoined from issuing execution upon said judgment, and that the same may be declared null and void, etc. The injunction, as prayed for, was awarded by the judge in vacation. At the January term, 1888, the defendants appeared, and demurred generally to the bill. The cause having been submitted to the court on the demurrer and the motion of the defendants to dissolve the injunction, on consideration whereof the court, by its decree of January 10, 1888, sustained the demurrer, dissolved the injunction, and made a personal decree against the plaintiff for \$322; that being the amount of the principal, interest, damages, and costs found to be due on the judgment enjoined in the cause, and the costs of this suit. It is from this decree that the plain-

tiff has appealed. The return on the summons issued by the justice, which is exhibited with the bill, is in these words:—

"Served the within by delivering a true copy to G. S. Couch in person, attorney in fact to accept service of process for Kanawha and Ohio railway, July 1, 1887.

"PETER SILMAN, C. K. C."

Our statute (see Code 1887, c. 54, sec. 37) provides that every corporation shall, by power of attorney, appoint some person residing in this state, wherein it has its principal office or place of business, to accept service, on behalf of the corporation, of any process or notice; and also that the process served upon the person so appointed shall be legal and binding upon the corporation. And sections 34, 35, 36, and 37 of chapter 50 of the code provide the manner in which service may be made on corporations for the commencement of actions in a justice's court. The next section is as follows: "38. Service on any person under either of last four sections [that is, sections 34, 35, 36, and 37 of chapter 50 of the code, which includes service on the attorney appointed under chapter 54, as aforesaid] shall be in the county in which he resides, and the return must show this, and state on whom the service was; otherwise the service shall not be valid." Comparing the return with the provisions of this statute, it is apparent that the service on the corporation was invalid, because it fails to show that it was served on the attorney in the county of his residence. The statute expressly commands that the return shall state that the service was in the county in which the person served resides; and declares that unless this is done, "the service shall be invalid." The service being thus invalid, and there having been no appearance by the corporation before the justice, the judgment, under such circumstances, is an absolute nullity. An invalid service is the same as no service whatever; and the law is well settled that a judgment rendered without an appearance by or service upon the defendant is void for the want of jurisdiction in the court to pronounce judgment: Freeman on Judgments, secs. 495, 521.

The next inquiry is, Will a court of equity entertain jurisdiction to enjoin a judgment at law upon the ground of its being void? In High on Injunctions, the author, after reviewing many cases on this subject, says, in section 230: "While the discussion of this branch of the preventive jurisdiction of equity, as applied to void judgments, as shown in

the preceding sections, has demonstrated a remarkable conflict of authority upon the right of relief by injunction in such cases, the prevailing tendency of the courts seems towards the establishment of the simple test, in such cases, of whether adequate remedy exists at law for the protection of the judgment debtor against the void judgment. Where such remedy exists, either by appeal, *certiorari*, application to the court itself which rendered the judgment, or any other legal and adequate manner, no satisfactory reason is perceived why equity should depart from the universal rule of withholding its extraordinary aid to redress a grievance which is remediable at law. Upon the other hand, where no adequate or complete remedy may be had at law in the usual and accustomed methods of procedure, it is equally difficult to conceive of any satisfactory reason for withholding relief by injunction, since the injury resulting from an absolutely void judgment would be otherwise irreparable. And while the decisions of the courts are, as already shown, far from being reconcilable even upon this simple test, it is believed that the tendency is towards its ultimate adoption as the true solution of this vexed question."

This, it seems to me, correctly states the rule of law on this subject; and especially is it the rule in Virginia and this state to deny and withhold relief in equity where there is a plain and adequate remedy at law. In *Hudson v. Kline*, 9 Gratt. 379, the court says: "It has been a favorite policy in this state, especially of late, not to afford relief in equity except in cases of concurrent jurisdiction. In all other cases he must avail himself of his legal remedy. If, without his default, he be deprived of all remedy at law, equity may relieve him; but if any legal remedy remain to him (that is, adequate remedy), though he may have lost, by misfortune, and without fault of his adversary, other concurrent legal remedies, he must resort to his remaining legal remedy." In *Goolsby v. St. John*, 25 Id. 146, the bill was filed to enjoin execution on a judgment which had been rendered without service of process or notice of the action. On demurrer to the bill, the court held that the defendant in the judgment having had notice of the judgment within the time limited for a motion to quash it, he had a remedy at law by such motion, and therefore he was not entitled to relief in equity.

The case at bar is very similar to the one last cited. That was a case in a court of record, while this is one tried by a jury in justice's court. But with this difference, the two

cases are the same; and if there is any adequate legal remedy by which the plaintiff here can obtain redress in any proceeding at law, then, upon the principles decided in *Goolby v. St. John*, *supra*, it cannot be entertained in a court of equity. This case having been tried before a justice by jury, the plaintiff could not have the case retried *de novo* by appeal under our statute: *Barlow v. Daniels*, 25 W. Va. 512. But this court has decided, in *Fouss v. Vandervort*, 30 Id. 327, that the circuit court has jurisdiction to review and reverse the judgment of a justice, rendered upon the verdict of a jury, by writ of *certiorari*. This is a plain and adequate remedy, which was open to the plaintiff here when his bill was filed in the circuit court, and which may still be resorted to by him to reverse the judgment here enjoined. It is therefore apparent, according to the principles hereinbefore announced, that the plaintiff, having an adequate remedy at law, is not entitled to relief in equity, and therefore the circuit court did not err in sustaining the demurrer to the plaintiff's bill.

If this were all that appeared in the decree of the circuit court, the same ought to be affirmed by this court; but that court not only sustained the demurrer and dissolved the injunction; it also entered a personal decree for the aggregate amount of the said void judgment, damages, and costs. Thus, in the same decree, it has adjudged that it has no jurisdiction to entertain the suit, and also pronounced a personal decree against the plaintiff, and thereby not only denied all relief to the plaintiff, for the reason that he had an adequate remedy at law, but, by its affirmative action, destroyed that legal remedy, and placed the plaintiff in a position which prevents him from obtaining relief elsewhere. This portion of the decree was therefore clearly erroneous. In pronouncing this personal decree, the court was evidently acting under the misapprehension that our statute (Acts 1882, c. 78, sec. 12) compelled it to enter such decree: *Wamsley v. Currence*, 25 W. Va. 543.

This statute, after providing that when an injunction to stay proceedings on a judgment is wholly or in part dissolved there shall be decreed to the judgment creditor damages, etc., proceeds as follows: "And in all cases the court or judge dissolving the injunction shall ascertain and enter in the decree of dissolution the amount of principal, interest, damages, and costs, including officer's fees and commissions due upon the judgment or decree at the date of the dissolution of the injunc-

tion, and shall award execution therefor against the defendant in the judgment," etc. While the language employed in this statute is very comprehensive, it would be both unreasonable and unjust to construe it to apply to a case such as the one under consideration. In this case, the court sustained the demurrer to the bill on the ground that it had no jurisdiction, and therefore wholly dissolved the injunction.

The only decree the court had power to enter in such case was one dismissing the plaintiff's bill; and this it is in positive terms directed to do in the section of the statutes following the one above quoted, which is as follows: "13. Where an injunction is wholly dissolved the bill shall be dismissed, with costs, unless sufficient cause be shown against such dismissal": Code, c. 133, sec. 13. In this cause, the court, instead of dismissing the bill, as it should have done, entered, as we have seen, a personal decree against the plaintiff, whereby it took from him his legal remedy to have the alleged judgment set aside, and made the said judgment, which is confessedly reversible, if not absolutely void, valid, and conclusively binding upon him. This was clearly an error, and for this error said decree must be reversed; and this court proceeding to enter such decree as the circuit court ought to have entered, the demurrer to the plaintiff's bill is sustained, the injunction wholly dissolved, and the said bill dismissed, with costs.

WRIT OF CERTIORARI. — The circuit court has jurisdiction upon a writ of *certiorari* to review, affirm, or reverse the judgment of the justice of the peace court rendered upon a verdict found from evidence submitted to a jury: *Fouse v. Vandervort*, 30 W. Va. 327; for a writ of *certiorari* is in the nature of a writ of error: *Chicago etc. R'y Co. v. Young*, 96 Mo. 39. But the conclusion of a justice of the peace rejecting defendant's claim of set-off, after hearing testimony in support of and against the same, cannot be reviewed on *certiorari*: *Garvin v. Gorman*, 63 Mich. 221. On *certiorari* it is only the answer of the justice which embodies and can identify the evidence before the jury in his court, and his answer may be traversed; but interrogatories appended to a petition for *certiorari*, but not identified by the justice, should not be considered by the superior court: *Akridge v. Watertown etc. Co.*, 77 Ga. 50. So it seems that the proper mode of reviewing the proceedings of inferior courts in the superior or circuit courts is by *certiorari*: *Williams v. Sutter*, 76 Id. 355; *Parria v. Hightower*, 76 Id. 631; *Swift v. Judges of Wayne County*, 64 Mich. 479; *Noyes v. Hillier*, 65 Id. 636; but see *Snyder v. Wilson*, 65 Id. 336.

JUSTICE OF THE PEACE COURTS. — No fact tried in a civil action by a jury before a justice of the peace can be retried *de novo* by the circuit court: *Hall v. Wadsworth*, 30 W. Va. 55; *Hickman v. Railroad Co.*, 30 Id. 296; *Vandervort v. Fouse*, 30 Id. 326; compare *State v. Sheppard*, 15 Or. 598. But in some states a case appealed from the justice of the peace court is tried *de*

now in the superior court, both as to questions of fact and law: *McOmber v. Baker*, 40 Minn. 388; *Deihm v. Snell*, 119 Pa. St. 316; compare *Fabretti v. Superior Court*, 77 Cal. 305.

JUDGMENTS OF JUSTICE OF THE PEACE COURTS are void, unless all the jurisdictional requirements of the statute have been substantially complied with: *Penrose v. McKinzie*, 116 Ind. 35; *Leathers v. Morris*, 101 N. C. 184.

JUDGMENTS RENDERED WITHOUT JURISDICTION are void, and no one can have a valid judgment against him in an action, unless he has been cited to appear therein, or at least been given an opportunity to be heard: Note to *Great West Mining Co. v. Woodmas etc. M. Co.*, *ante*, p. 220.

EQUITY WILL NOT GRANT RELIEF when an adequate remedy is afforded at law: *Nelson v. Hamner*, 84 Va. 909; *Canada v. Barksdale*, 84 Id. 742; *Town of Menz v. Cook*, 108 N. Y. 504; *Wheelock v. Noonan*, 108 Id. 179; but when a court of equity has once acquired jurisdiction of a cause upon equity grounds, it will retain jurisdiction, even for the purpose of granting legal remedies which otherwise would be beyond its jurisdiction: *Beecher v. Lewis*, 84 Va. 630. If a judgment rendered in the circuit court is erroneous, equity cannot remedy the error, for the legal remedy is by appeal to the appellate court: *Putnam v. Webb*, 15 Or. 440.

BECK v. THOMPSON.

[81 WEST VIRGINIA, 459.]

DAMAGES IN ACTION FOR ASSAULT AND BATTERY. — In an action of trespass for an assault and battery, damages cannot be recovered by way of punishment to the defendant, but for compensation to the plaintiff for the injury done to him; and in considering the amount of damages, the jury may consider, not only the physical injury and physical suffering, and the expenses and loss of time and wages, but also the mental anguish, shame, and dishonor suffered by the plaintiff. And an instruction in such case that "if the jury believe, from the evidence, that the assault in the declaration mentioned was committed by the defendant, the plaintiff is only entitled to compensation for such injuries as he may have shown, from the evidence, were caused by the said assault, they will not award punitive, vindictive, or exemplary damages," is properly refused, because it does not propound the law correctly, and is misleading.

DISQUALIFICATION OF JUROR NOT GROUND FOR NEW TRIAL WHEN. — A new trial will not be granted on the ground of a juror's disqualification for a matter that is a principal cause of challenge, which existed before he was elected and sworn, but which was unknown to the party until after the trial, and which could not have been discovered by the exercise of ordinary diligence, unless it appears, from the whole case, that the party suffered injustice from the fact that such juror served upon the trial of the case.

TRESPASS. The opinion states the case.

W. H. Travers, for the plaintiff in error.

C. Baylor, for the defendant in error.

JOHNSON, President. This is an action of trespass, brought in the circuit court of Jefferson County in January, 1886, for an assault and battery committed by the defendant upon the plaintiff. The defendant pleaded not guilty, and on trial of the issue the jury rendered a verdict for \$250 damages. The defendant moved for a new trial, which motion was overruled, and judgment entered on the verdict. The defendant saved two bills of exceptions,—the first, to the refusal to give an instruction; the second, to the refusal of the court to set aside the verdict, and grant a new trial. A writ of error and *superseas* was granted the defendant.

The first error assigned is, that the court refused to give the following instruction: "If the jury believe, from the evidence, that the assault in the declaration mentioned was committed by the defendant, the plaintiff is only entitled to compensation for such injuries as he may have shown, from the evidence, were caused by the said assault, they will not award punitive, vindictive, or exemplary damages." The rule as to the kind of damages a party is entitled to recover in an action for seduction was announced by this court in *Riddle v. McGinnis*, 22 W. Va. 253, that "the jury, in estimating the damages sustained by the plaintiff, may take into consideration the mental anguish, the dishonor, and shame endured by the plaintiff, as well as the actual expenses incurred by reason of the wrongful act of the defendant." That was an action for seduction in which there was no physical suffering; but in an action for assault and battery, in addition to the physical injury and suffering endured by the plaintiff, he also would suffer mental anguish, because of the dishonor and shame, and for all these he would be entitled to be compensated in damages.

In *Pegram v. Strotz*, 31 W. Va. 220, decided by this court February 28, 1888, after quoting the provision of the statute that "an action may be maintained . . . by a wife against the person selling or furnishing such spirituous liquors, as well as for all such damages as the plaintiff has sustained by reason of the selling or giving such liquors, as for exemplary damages," it was held that "by exemplary damages is meant, not additional damages, given as a punishment of the defendant for selling intoxicating liquors to her husband illegally, but damages which shall not only compensate her for injury to her means of support, but also, in a proper case, damages which shall compensate her for her mental anguish." In this

last case, the doctrine that in a civil case punitive, vindictive, or exemplary damages can be imposed as a mere punishment to the defendant is repudiated. But it by no means follows that in an action for an injury wantonly inflicted by one person upon another the damages are confined to the mere making good the pecuniary loss which the injured party has suffered,—as his loss of wages for the time he was disabled, and the expenses of nursing and medical attendance,—for he is not only entitled to recover for these, but for the physical injury received and the physical suffering endured; but the jury may, in addition to this, compensate him for the mental anguish, shame, and dishonor which he has suffered.

In this case, the instruction was that the plaintiff was 'only entitled to compensation for such injuries as he may have shown, from the evidence, were caused by the assault; they will not award punitive, vindictive, or exemplary damages.' Now, we have seen from the decision in *Pegram v. Stortz, supra*, that exemplary damages may be recovered, not by way of punishment to the defendant, but compensation to the plaintiff. These terms have been used with different definitions, and have not uniformly been understood to mean the same thing. The instruction, coupled with the last clause, would say to the ordinary jurymen, "Do not give the plaintiff any damages except for loss of time, expense of nursing and medical attendance"; that is, what he would understand by compensation for such injuries as he may have shown, from the evidence, were caused by the said assault. The instruction did not propound the law correctly, was misleading, and properly refused.

The second bill of exceptions shows by an affidavit of the defendant that J. H. Langdon, one of the jurors who rendered the verdict against him, says: "That he was not informed, and did not know until after the said case was argued and submitted to the jury, that one of the said jurors, J. H. Langdon, had pending in the same court any matter of fact to be tried by a jury which was expected to be tried during the same term, or that he had a matter of like character as that involved in said cause in which this defendant is a party."

The bill of exceptions further shows that one of the jurors who was sworn to try the issue joined in this case was one of the *venire* summoned for the term; that at the same term of the court an action of trespass on the case for an assault and

battery in which said juror was plaintiff had matured for trial, and was set for trial on the calendar of the court the next day after the day of the trial of this action; that this disqualification of said juror was known to counsel for defendant after the jury retired, and before the rendition of their verdict; and that no motion was made to the court on this subject until after verdict. The court overruled the motion for a new trial, and entered judgment, and the defendant excepted.

The statute under which it is claimed the verdict should be set aside is section 28 of chapter 116 of the code, and is as follows: "No person shall serve as a juror, except in trials for felony, at any term of a court during which he has any matter of fact to be tried by a jury, which shall have been, or is expected to be, tried during the same term": Acts 1882, c. 83. Section 19 of the same chapter of the code (116) provides as follows: "No irregularity in any writ of *venire facias*, or in the drawing, summoning, or impaneling of jurors, shall be sufficient to set aside the verdict, unless the party making the objection was injured by the irregularity, or unless the objection was made before the swearing of the jury."

In *State v. McDonald*, 9 W. Va. 456, a member of the grand jury which found the indictment was sworn to try the prisoner, and after the trial, motion was made to set aside the verdict on the ground that the juror was disqualified. The motion was denied, and the appellate court affirmed the judgment. And so it has been held in this state that when it does not appear any injustice was done the party a verdict will not be set aside because a juror had made up and expressed an opinion on the case before he was sworn as a juror: *State v. Strauder*, 11 Id. 745; 27 Am. Rep. 606; *Sweeney v. Baker*, 13 W. Va. 158; 31 Am. Rep. 757; *State v. Greer*, 22 W. Va. 800. The same rule has been held where the juror was disqualified because he was not a citizen of the state: *Zickefoose v. Kuykendall*, 12 Id. 23.

The rule as laid down in these cases is, as to civil cases as well as in criminal cases, that a new trial will not be granted for matter that is a principal cause of challenge which existed before a juror was elected and sworn, but which was unknown to the party until after the trial, and which could not have been discovered by the exercise of ordinary diligence, unless it appears from the whole case that the party suffered injustice from the fact that such juror served upon the case.

And the meaning of the words "unless it appears from the whole case that the party suffered injustice from the fact that such juror served upon the case" is, unless it appears from the whole case, as shown by the evidence submitted to the court on a motion for a new trial (and not from the evidence before the jury), that the party suffered injustice from the fact that such jurors served upon the case: *State v. Greer*, 22 W. Va. 800.

It does not from the record appear that Thompson suffered the slightest injustice by reason of the disqualified juror being on the jury. There is no reason to distinguish this case from the others we have cited. The statute covers them all alike. It is here insisted that section 28 of chapter 116 is an inhibition to the juror sitting in the case; but section 19 of the same chapter, which must be read with it, declares that in such case the verdict shall not be set aside unless the objection was made before the jury was sworn, or the party making the motion was injured by the irregularity. No injury was done him; and it would greatly interfere with the administration of justice if verdicts could be set aside for such reasons.

There is no error in the judgment, and it is affirmed.

EXEMPLARY DAMAGES. — A carrier is responsible for punitive damages for wrongfully ejecting a passenger from its cars; and it is error to sustain a demurrer to that part of a complaint which sets up punitive damages: *Head v. Georgia P. R'y Co.*, 79 Ga. 358; 11 Am. St. Rep. 434, and cases cited in note.

ASSAULT AND BATTERY — DAMAGES. — Exemplary damages are recoverable for an oppressive or malicious assault upon a person: *Bundy v. Maginess*, 76 Cal. 532; compare *Clark v. Weir*, 37 Kan. 98; *Cleveland v. Stilwell*, 75 Iowa, 466.

DISQUALIFICATION OF A JUROR is a ground for a new trial, when the party complaining was probably prejudiced by such disqualification, and it is error to refuse to sustain a motion for a new trial under such circumstances: *State v. Cleary*, 40 Kan. 287.

STATE v. SHORES.

[81 WEST VIRGINIA, 491.]

JOINDER OF OFFENSES IN INDICTMENT, WHEN GROUND FOR QUASHING, AND WHEN NOT. — If an indictment contains different counts which are in fact for separate and distinct offenses, and this fact appears on the opening of the cause, or at any time before the jury are sworn for the trial thereof, the court may quash the same, lest it may confound the prisoner in his defense, or prejudice his challenges of the jury; and in such case, if the defect is discovered after the jury is sworn, and before the verdict is found, the court may require the prosecutor to elect on which charge he will proceed. But if the charges in the different counts of the indictment are of the same general character, and are manifestly inserted in good faith for the purpose of meeting the various aspects in which the evidence may present itself upon the trial, the court will neither quash the indictment nor compel the prosecutor to elect upon which count he will proceed to trial.

INDICTMENT IN TWO COUNTS, ONE FOR BREAKING INTO DWELLING-HOUSE of a person, and the other for breaking into his storehouse, is good, where it is evident, from the face of the indictment, that the two counts were made to meet the proof that the dwelling-house and storehouse were in the same building.

RECORD SHOWING PRISONER WAS INDICTED "FOR FELONY" is a sufficient finding of the indictment, notwithstanding it contains two counts.

INDICTMENT IS NOT VITIATED BY OMISSION TO WRITE AT FOOT OF IT NAMES OF WITNESSES on whose evidence it was found. The statute requiring the names of such witnesses to be written at the foot of the indictment is directory, not mandatory.

ACT OF 1887 PERMITTING PROSECUTING ATTORNEY TO STRIKE OFF TWO JURORS from the panel of twenty, and the prisoner six, is constitutional. SHERIFF OR DEPUTY NEED NOT BE SWORN EACH DAY he has the jury in charge in a felony case to keep the jury together, etc.

SHERIFF IS NOT DISQUALIFIED FROM BEING WITNESS because he has the jury in charge; nor does the fact that he is a witness disqualify him to keep the jury in his custody.

PRISONER IS NOT PREJUDICED BY EVIDENCE SHOWING THAT OTHERS INDICTED WITH HIM ARE IN JAIL.

REFUSAL TO TAKE INDICTMENT FROM JURY, NOT ERROR WHEN. — Where, on the trial of a prisoner jointly indicted with two others, the indictment, with an indorsement thereon of a verdict of a jury finding one of them guilty, is shown to the jury, and taken by them to the jury-room, it is not error for the court to refuse to send to the jury-room and take the indictment from the jury while they are deliberating.

COURT MAY LIMIT TIME OF COUNSEL IN FELONY TRIAL in their arguments to the jury, provided the time be not made so short as to manifestly prejudice the rights of the prisoner.

IMPROPER REMARKS OF COUNSEL ARE NOT GROUND FOR REVERSAL, unless it appears from the record that the prisoner's rights were prejudiced thereby.

INTENT TO STEAL IS NECESSARY TO CONSTITUTE LARCENY.

DRUNKENNESS IS NO EXCUSE FOR COMMITTING CRIME.

INDICTMENT for burglary. The opinion states the case.

French and French, and C. W. Smith, for the plaintiff in error.

Alfred Caldwell, attorney-general, for the state.

JOHNSON, President. On the twelfth day of March, 1888, Stape Hall, Bailey Hall, and Will Cox were indicted in the circuit court of Mercer County for burglary. The indictment contained two counts. The first charges that the defendants, "on the fifteenth day of February, 1888, about the hour of ten o'clock in the night-time of that day, feloniously and burglariously did break and enter into the dwelling-house of one L. Schereschewsky, situate in the said county, with intent the goods and chattels of him, the said Schereschewsky, in the said dwelling-house then and there being, then and there . . . to steal," etc. The second count charges that the defendants, "on the fifteenth day of February, 1888, about the hour of ten o'clock in the night-time of that day, feloniously and burglariously did break and enter into the storehouse of one L. Schereschewsky," with intent to steal, etc. The defendants demurred to the indictment and to each count thereof, which demurrer was overruled, and the prisoners pleaded not guilty. The prisoners elected to be tried separately.

On the nineteenth day of March, 1888, the defendant Will Cox in open court stated that his name was not Will Cox, but J. W. Shores. Thereupon the court ordered that the name of J. W. Shores be inserted in the indictment instead of Will Cox, which was accordingly done. The issue as to J. W. Shores was tried by a jury, which, on the twenty-fourth day of March, 1888, found the prisoner guilty as charged in the second count in the indictment. The prisoner moved to set aside the verdict, and for a new trial; also moved in arrest of judgment; which motions the court overruled, and sentenced the prisoner to be confined in the penitentiary for one year. The prisoner saved a bill of exceptions to certain rulings of the court, which he here assigns as error upon the writ of error obtained by said defendants.

The first assignment of error is the overruling the demurrer to the indictment. The grounds alleged are: 1. That the indictment charged two separate and distinct felonies. In the case of *State v. Smith*, 24 W. Va. 814, the indictment contained two counts for murder,—one for killing McDaniel; the other, McDonald. The court, by Woods, J., said: "These

different counts are generally intended to charge the commission of the same offense, with such varied description of the person or property which is the subject of the offense, or of the title of the ownership of the property, or of the means, instruments, and agencies by which the offense was committed, as will meet the various aspects in which the evidence may present itself upon the trial. . . . In all cases, however, in which there are two or more counts in the indictment, whether there is actually one offense or several, each count is regarded as a separate indictment, and is supposed to represent a distinct offense: *Linkous's Case*, 9 Leigh, 612. But I have been unable to find in Virginia or this state any case in which more than one criminal transaction was embraced in a single indictment for felony, although in many cases where the offenses are of the same character, differing only in degree, the indictments have contained two or more counts in which the same transaction in the form of distinct and separate felonies is represented. But as in every such case the separate counts are regarded as separate indictments for distinct offenses, it will, in most cases, be impossible for the court, from an inspection of the indictment, to determine whether the various counts represent the same transaction under different forms, or whether in fact they represent wholly different and distinct offenses. If all or any of such counts are perfect upon their face, a demurrer to or motion to quash the indictment for the supposed misjoinder of counts must be overruled, although some of the counts may in fact represent separate and distinct offenses, for the reason that this fact can only be made to appear from the evidence introduced on the trial": See also *State v. Halida*, 28 W. Va. 499.

The rule, as appears in points 4 and 6 of the *syllabus* in *State v. Smith*, 24 W. Va. 814, is: "4. If the indictment contains different counts which are in fact for separate and distinct offenses, and this fact appears on the opening of the cause, or at any time before the jury are sworn for the trial thereof, the court may quash the same, lest it may confound the prisoner in his defense, or prejudice his challenges of the jury; and in such case, if the defect is discovered after the jury is sworn, and before the verdict is found, the court may require the prosecutor to make his election on which charge he will proceed." "6. If the different counts in an indictment, purporting to be for separate and distinct offenses, are inserted in good faith for the purpose of meeting a single

charge, the court will neither quash the indictment nor compel the prosecutor to elect upon which count he will proceed to trial." Here the charges are of the same general character. The first count charges breaking into the dwelling-house of Schereschewsky, and the second, into his storehouse. It is evident, from the face of the indictment, that the two counts were made to meet the proof, as we may well suppose, which was a fact, as disclosed by the evidence, that the dwelling and storehouse were in the same building. The demurrer was properly overruled. The record shows the defendant was indicted "for felony." That is a sufficient finding of the indictment, notwithstanding the two counts therein.

But the further objection is made to the indictment, that the names of the witnesses on whose evidence the indictment was found were not written at the foot thereof, in accordance with the requirements of the statute. This court held in the case of *State v. Enoch*, 26 W. Va. 253, founding its decision on *Dever's Case*, 10 Leigh, 685, and *William's Case*, 5 Gratt. 702, that the statute was directory, and the omission did not vitiate the indictment. We are asked to overrule these authorities, and hold the indictment fatally defective. We held, after a review of the authorities, in *State v. Cain*, 20 W. Va. 679, that it is not the duty of the prosecuting attorney on a criminal trial to examine all the witnesses who were present at the commission of an alleged offense, nor all the witnesses who were sent to the grand jury when the indictment was found, and whose names are at the foot of the indictment, and who may have been examined at the coroner's inquest, and who have been recognized to appear at the trial by the state; that it is the province of the prosecuting officer, and not of the court, to determine who shall be examined as witnesses on behalf of the state.

If the attorney for the state is not obliged to call the witnesses whose names are written at the foot of the indictment, but may call other witnesses in their place, what harm can be done to the accused by the omission of their names? The bill of rights does not require it. It requires that "the accused shall be confronted with the witnesses against him"; that is, at the trial the witnesses shall be produced, their depositions cannot be given, and hearsay evidence shall not be permitted. The statute, held directory in *Commonwealth v. Dever*, 10 Leigh, 685, required "the title or profession of the prosecutor to be written at the foot of an information or in-

dictment." In *William's Case*, 5 Gratt. 702, the statute, held to be merely directory, is substantially the same as that in force when *Enoch's Case*, *supra*, was decided, and is now in our code. *William's Case*, *supra*, was decided forty years ago, and we have no inclination to disturb it now. Whatever may have been decided elsewhere, we hold the law to be settled in Virginia and this state that such a statute is not mandatory, but directory. For the reason stated while discussing the demurrer to the indictment, and on the authority of *State v. Smith*, 24 W. Va. 814, the court did not err in refusing to require the attorney for the state to elect on which count of the indictment he would proceed.

It is insisted the court erred in permitting the attorney for the state, against the objection of the prisoner, to strike two jurors from the panel of twenty qualified jurors, on the ground that the act of 1887 permitting it is unconstitutional. It is not claimed that it is unconstitutional because it denies the prisoner any right secured to him by the constitution, but because the act was passed at an extraordinary session of the legislature, and it is claimed the subject was not embraced in the proclamation of the governor. The constitution provides that "the governor may, on extraordinary occasions, convene, at his own instance, the legislature; but when so convened, it shall enter upon no business except that stated in the proclamation by which it was called together": Sec. 7, art. 7. The governor, under this authority, issued his proclamation convening the legislature in extra session on the third Wednesday in April, 1887, to consider and act upon the business stated in the proclamation,—among other business, "to protect the public treasury against unnecessary expenditures by regulating the costs, charges, and proceedings in criminal cases before justices of the peace and circuit courts": Acts 1887, p. 235. The legislature so convened, on the seventh day of May, 1887, amended sections 1, 3, 4, and 8 of chapter 159 of the code. The first clause of section 3 was amended so as to read: "In case of felony, twenty jurors shall be drawn from those in attendance for the trial of the accused. If a sufficient number of jurors for such panel cannot be procured in this way, the court shall order others to be forthwith summoned and selected, until a panel of twenty jurors free from exceptions be completed; from which panel the accused may strike off six jurors, and the prosecuting attorney may strike off two jurors," etc. The section, by its terms, applies only to

indictments for offenses committed after the act took effect. This act the governor approved, thus deciding for himself that it was embraced in the subjects mentioned in the proclamation: Acts 1887, c. 6, p. 243.

All the presumptions are in favor of the constitutionality of the act. If by any reasonable construction of the language of the proclamation the subject legislated upon in section 3 is embraced therein, the act is constitutional. If the direct tendency of this act is to lessen the expenses of criminal trials, and thus, to any extent, protect the public treasury against unnecessary expenditures, and no constitutional right of the citizen is abridged thereby, then the act is within the list of subjects embraced in the proclamation, and the act is constitutional. We cannot see how the act in any wise abridges the constitutional rights of the citizen: *State v. Davis*, 31 W. Va. 24. We judicially know that one great cause of expense in criminal trials is hung juries, and, as a consequence, new trials. The panel must contain twenty jurors free from legal exception. When all the challenges for cause have been made by both the state and the prisoner, and the panel contains twenty jurors, there remains eight peremptory challenges for cause entirely within the breast of the challenger. He may strike off the number he is permitted by law to strike, without assigning any reason therefor.

As the law formerly stood, the prisoner alone was permitted to exercise the right of peremptory challenge. If he had a warm personal friend on the jury, who would be unconsciously prejudiced in his favor, of course he would be left on the jury, and so would all such, unless they were more than twelve. The prosecuting attorney might see two of the most intimate friends of the accused on the jury, men who he might have every reason to believe would refuse to render a verdict against the prisoner. He is powerless to prevent them remaining on the jury. He goes through the trial, and because these men were on the jury, there is no verdict, and there must be another trial with all its attendant expense to the state. There can be no doubt that giving the prosecuting attorney a peremptory challenge of two jurors tends to prevent hung juries and mistrials, and to lessen the expense of criminal trials, and thus protect the public treasury. We see no objection to the act because it was passed at the extra session, and it is constitutional and valid.

It is assigned as error that the sheriff or deputy was not

sworn each day they had the jury in charge. It is not necessary that during the progress of the trial of a felony case the sheriff or deputy should be sworn each day to keep the jury together, etc., that being their duty under the law: *State v. Poindexter*, 23 W. Va. 805.

It is also assigned as error that George L. Karnes, the sheriff of the county, was examined as a witness, and the jury was in his custody. There was no exception either to his being sworn or having the jury in custody. The mere fact of his being the sheriff, and having the jury in his custody, could not disqualify him from being a witness, neither could the fact that he was a witness disqualify him to keep the jury in his custody.

It is assigned as error that the court permitted evidence, against the objection of the prisoner, that Stape Hall and Bailey Hall, the men who were jointly indicted with the prisoner, were in jail. Why this evidence was offered does not appear, but it did not prejudice the prisoner. Neither was the prisoner prejudiced by the refusal of the court to send to the jury-room and take from the jury, while they were deliberating, the indictment on which was written the verdict of another jury finding Bailey Hall guilty of the offense charged in the indictment. They were being separately tried. If the defendant had moved the court not to let the jury have the indictment, but a copy, it would raise another question that we will not here decide. He might also have asked the court to have instructed the jury not to regard the indorsement on the indictment of the finding against Hall. The jury had seen the indictment with the indorsement before any motion was made with reference thereto. Every member of the jury may have been in court and heard the verdict read against Hall, and still that would not have disqualified them as jurors.

It is assigned as error that the court limited the arguments. It was held (*Words's Case*, 3 Leigh, 744) that "the accused has the right to be heard by counsel before the jury, and the court has no right to prevent him from being so heard, however simple, clear, unimpeached, and conclusive the evidence in its opinion may be; but the court has a superintending control over the course of the argument to prevent the abuse of that or any other right of counsel." If the court had no right to limit counsel in a criminal case, the administration of justice in many instances would be greatly hindered. It rests in the sound discretion of the court in a criminal case

to put a proper limit to the time consumed by counsel; a discretion with which the appellate court will not interfere, unless the time was made so short as to manifestly be prejudicial to the rights of the prisoner. In this case the court limited the counsel on each side to four hours. There is nothing in the record to indicate that the limitation was unreasonable.

The prisoner offered to show that the cider sold by L. Schereschewsky was intoxicating, and that said Schereschewsky kept other intoxicating drinks in his store, to which evidence the attorney for the state objected. The objection was sustained, the court refused to permit the evidence to be given to the jury, and the prisoner excepted. The court properly refused to admit the evidence, as it could throw no light on the issue whether the prisoner broke and entered the store with intent to commit larceny.

In the argument of the case one of the attorneys for the state, during the course of his argument, stated that he and his associates were employed to prosecute this case, and that the good people of Bramwell to a man had employed them to prosecute this case. To this statement the prisoner at the time objected and excepted, and the court said, "The counsel's statement is stricken out as improper." Another of the attorneys for the state, in the concluding argument of the case, argued that if the prisoner and his associates were capable of committing the several offenses which the evidence showed they had openly committed on the night of the 27th of February, 1888, and as admitted by their counsel in his argument, then it followed that they were capable of committing openly the crime with which they stood indicted. The prisoner at the time objected to the argument of the counsel, but the court held the argument proper, and permitted him to proceed. The argument referred to was made in reply to argument of the prisoner's counsel of the unreasonableness of the state's theory that the prisoner would commit the crime charged against him in the indictment as shown by the evidence, to which ruling of the court the prisoner excepted. As to the statement of the first counsel, the court ruled it out as improper. That is all the court could do, and the prisoner was not prejudiced. As to permitting the second counsel to proceed, the court did not err. As the record shows, it was a proper reply to arguments of prisoner's counsel. Counsel necessarily have great latitude in the argument of a case, and

it is of course within the discretion of the court to restrain them; but with this discretion the appellate court will not interfere, unless it clearly appears from the record that the rights of the prisoner were prejudiced by such line of argument.

The tenth assignment of error is to the giving of the instructions for the state, and refusing to give certain instructions for the prisoner. The evidence is all certified, and before proceeding to discuss the instructions, we will state the substance of the evidence. I will give the substance, first, of the evidence of George Strader, who was employed in the store of L. Schereschewsky. The said Schereschewsky was the owner of a house in Bramwell, Mercer County, West Virginia. The house contained five rooms,—three upstairs and two down. The three upper rooms were used for dining-room, kitchen, and chamber in which he slept. The owner kept a store of general merchandise in the two lower rooms. Witness was, from the 1st of February, 1888, to the time of the trial, a clerk or salesman of the owner in said town. On the night of the twenty-seventh day of February, 1888, while he was in the storeroom, about eight o'clock in the night, the prisoner and Bailey Hall came into the storeroom, and soon thereafter Stape Hall came in. One of them called for cider, which was sold to them by L. Schereschewsky, and paid for, and they drank some cider, and also something witness thought was bitters. They offered witness and L. Schereschewsky some of the bitters which they did not drink. The prisoner and said Halls then left the storeroom, and some time afterwards they, or one of them, returned again, and called for a fiddle; said they wanted to go to some kind of a show or exhibition that was in town that night. There was no fiddle in the house, and they went off again. About half-past nine, or perhaps ten o'clock, the prisoner and the Halls returned to the store and got some more cider. By this time they were so drunk they did not know what they were doing; they were very boisterous, and did not know what they were talking about. A man with a black mustache was in the store at that time, whom the witness did not know. A pistol went off in the house in the hands of either the prisoner or the unknown man. Before the pistol was discharged, prisoner had called for cider, which the witness poured out for him,—two glasses full, in four glasses. Witness supposed they wanted to spike it. They put something else into it, witness did not know what, and set it upon the counter,—the usual place for delivering cider

and goods to customers. About the time witness poured out this cider, the pistol went off, and witness said to one of them, he thought it was to Bailey Hall, to get them out and stop the shooting, and said Bailey Hall said he would, and that a drink did not make him such a fool. They then started out. Prisoner fired off his pistol one time when at the door, in the direction of the street. Witness closed the door and locked it immediately after they had gone out. That the cider was worth five cents. After witness had locked the door, he left the lights burning in the storeroom, and went out through a door in a back room and went up the back stairway, and from this place saw two of the four who had gone out of the storeroom standing near the east front corner of the storehouse, and heard the others near the west front corner, and they were all talking aloud and in a boisterous manner. Witness then went out, and was gone some time, and when he returned to the storehouse found the prisoner, the two Halls, Schereschewsky, and John Kenon in the storeroom, and Bacon tried to arrest them, but they resisted. Witness examined the store-door. The bolt was thrown as if the door was locked. The door was a double one. One side was fastened by a foot-bolt at the bottom and a spring-latch at the top. Witness saw no damage done in any way to the door.

On cross-examination he said, so far as he knew, the business houses in the town were open at the time of the breaking; that Schereschewsky kept cider in the store for sale, and that witness was authorized to sell it; that witness was in the habit of delivering cider to customers to drink in glasses on the store counter; that sometimes they paid for it before and sometimes after they drank, but that he had never demanded pay from any one for cider before they drank it. It was also shown that when the prisoner and the Halls returned to the store, and found the door fastened, they pressed against it with their knees, and it was forced open. This was seen from a store across the street. The lights were then burning in Schereschewsky's storeroom.

I do not pretend to refer to all the evidence, but a careful reading of it impresses the mind in this way: Three men, the prisoner and two others, were quite drunk; they went into a store, called for cider; it was poured out; it was paid for, and they drank it; they went away, and after some time came back, called for more cider, which was poured out to them in glasses on the counter; they were about to drink it when the

pistol of one of them was discharged; some excitement occurred, it being a drunken brawl; they went out, the cider still in the glasses on the counter for them; the clerk immediately closed the door, and locked it, but left the lights burning brightly in the store; at the time, the stores in the town were lighted. They soon came back, still intoxicated; saw the lights burning in the store; were quite anxious to get the cider; pushed against the door; the side that was bolted at the bottom and latched at the top, being insecurely fastened, was pushed open. There was no harm done to the door. They went into the store, and two or three other men witnessed them drink the cider, and that was all they took. There is not the slightest proof that they took anything else, or went in with intent to take anything else.

The first instruction for the state instructs the jury, in substance, that, under the circumstances we have set forth, if the jury believe the cider was not paid for, and the prisoner went back and took it off the counter and drank it without the consent of L. Schereschewsky, then such taking was larceny. This instruction was clearly wrong. It ignores the fact, which is very probable, that the prisoner honestly believed that the cider had been delivered to him, and it was his. If he did so believe, then the intent to steal was wanting, and it was not larceny. Besides, it appears that the cider was taken from the counter when the lights in the store were burning, and in the presence of several others, who followed the prisoner into the store after the door had been pushed open, and drank in their presence. The fact that it was so taken from the counter under the circumstances, and openly and publicly appropriated to the use of the prisoner, furnishes the strongest evidence of the *bona fide* claim of right to the cider so taken: *Causey v. State*, 79 Ga. 564; 11 Am. St. Rep. 447. In *Vaughn's Case*, 10 Gratt. 764, Judge Moncure, in his dissenting opinion in the case, said: "That property is taken openly, in the presence of the owner, affords a strong presumption that it was not taken feloniously. This presumption may be repelled by evidence; but strong evidence should be required for that purpose when the property taken is the parties' own bond."

The other instructions given for the state propounded the law correctly, and are to the effect, if the prisoner broke and entered the storehouse with intent to commit larceny, he is guilty as charged.

The court gave seven instructions at the instance of the

prisoner, and refused seven. The first instruction refused and the eighth asked is the contrary of the first given for the state. It, we think, propounds the law correctly, and tells the jury, reciting the main facts, if they believe these facts, and if they believe that the agent of Schereschewsky poured out the cider to the prisoner, and put it on the counter, the usual place of delivering goods sold, and he went in and drank it, honestly believing it was his, then the crime of burglary was not proven.

The ninth instruction is in these words: "The jury is further instructed that if they are satisfied, from the evidence, that the prisoner broke and entered the store or dwelling house mentioned in the indictment at the time therein mentioned, and they further believe at the time he so broke and entered said house he was intoxicated or drunk, such intoxication or drunkenness is proper to be considered in determining the intention with which he broke and entered said house; and if they believe, from the evidence, that he was then so much intoxicated as to be unable to understand the criminality of his actions, or forming a criminal intent, then the jury should find for that reason not guilty under either count of the indictment." This instruction was properly refused. Drunkenness is no excuse for crime; and it can only be considered by the jury in one instance, and that is, to determine in a murder case whether the prisoner could have deliberated and premeditated, and thus to see whether he was guilty of murder in the first or second degree: *State v. Robinson*, 20 W. Va. 713; 43 Am. Rep. 799; *Hopt v. People*, 104 U. S. 631.

For the same reason the fourteenth instruction asked for the prisoner was properly refused. The tenth, eleventh, twelfth, and thirteenth instructions asked, being substantially the same as the eighth, which we have considered, were correct, and should have been given in substance.

We have disposed of the instructions. We will not consider the evidence on the motion for a new trial, as the case will be remanded for a new trial. The judgment is reversed, the verdict of the jury set aside, and the case remanded for a new trial.

JOINDER OF OFFENSES IN AN INDICTMENT. — The law as to two or more counts in one indictment is the subject of note to *State v. Bell*, 92 Am. Dec. 661-665; *State v. Nelson*, 14 Rich. 169; 94 Am. Dec. 130; *Sarah v. State*, 23 Miss. 267; 61 Am. Dec. 544; note to *Ben v. State*, 58 Am. Dec. 238-250. An indictment is not bad for duplicity because it contains several counts charging

different misdemeanors: *Alexander v. State*, 27 Tex. App. 533; but different parties cannot be charged in the same indictment with different and distinct offenses: *State v. Hall*, 97 N. C. 474; nor can counts for felonies be joined in the same indictment with others for misdemeanors, especially where the offenses are of different characters: *Doyle v. State*, 77 Ga. 513.

INDICTMENT. — An indictment for even a felony valid in all other particulars is not invalidated by a failure of the clerk recording it to copy the indorsement upon it, "a true bill," with the grand jury foreman's signature thereto: *State v. Herron*, 86 Tenn. 442; for the indorsement upon the back of an indictment is no part of the indictment proper: *State v. Sheppard*, 97 N. C. 401.

MISCONDUCT OF COUNSEL IN ARGUMENT to the jury will cause a reversal when appellant was prejudiced thereby: *People v. Aikin*, 66 Mich. 460; 11 Am. St. Rep. 512, and note 531; extended note to *McDonald v. People*, 9 Id. 559-560.

LARCENY—INTENT. — To constitute larceny, intent to steal must be present: *State v. Warden*, 94 Mo. 648; and if property is taken away in broad daylight, without concealment, under an honest belief that the taker is entitled by right to such property, the jury is warranted in finding that the intent to steal was absent: *People v. Eastman*, 77 Cal. 171; *Causey v. State*, 79 Ga. 564; 11 Am. St. Rep. 447; *Black v. State*, 83 Ala. 81; 3 Am. St. Rep. 691.

CRIMINAL LAW—DRUNKENNESS. — The general rule is, that drunkenness is no defense by way of excuse for committing crimes: *Flanigan v. People*, 86 N. Y. 554; 40 Am. Rep. 556, and extended note 560-570.

MEDFORD v. LEVY.

[31 WEST VIRGINIA, 649.]

MALICIOUS ANNOYANCE OF NEIGHBORS IS RESTRAINABLE NUISANCE WHEN.

— When acts are done for the malicious or willful purpose of annoying a neighbor, and they have that effect, and make his home uncomfortable, the doing thereof amounts to a private nuisance which a court of equity will restrain, although the doing thereof might not, under other circumstances, amount to a nuisance.

COURT OF EQUITY IS DISINCLINED TO INTERFERE IN MERE DOMESTIC BROILS; and where trouble arises between two families occupying rooms in the same house, and using the halls and stairways in common, the court will not restrain one of them from committing a nuisance against the other, unless the proof of the existence of the nuisance is clear and strong. It will not interfere if it appears that both parties are in fault.

BILL for injunction. The opinion states the case.

Gibson and Michie, for the appellants.

Simms and Enslow, for the appellees.

JOHNSON, President. This is a bill of injunction to restrain a private nuisance. The plaintiffs, in February, 1887, pre-

sented their bill in vacation to the judge of the circuit court of Cabell County, in which Thomas Medford alleges that he is the owner in fee of a three-story brick and stone building in the city of Huntington; that the lower story is used as a business room, and the second story for dwelling purposes, and the third has not been used for any special purpose; that on or about the first day of November, 1885, the plaintiff, who had occupied the first floor with a stock of queen's-ware, determined to sell or rent the same; that on the 20th of that month he rented to Joseph Levy the store and three rooms on the second floor for a dwelling for one year, with the privilege of three years; that said Levy has been occupying the second floor of said building since 1884; that there is a front and rear stairway leading to the second floor, and a large hall at the top of the stairways; that himself and wife, a little girl, and a house-girl occupy some of the said second-story rooms, and the said defendants occupy the others, the stairs and hall being used in common; that the front room on the east side is used by the plaintiff as a parlor, and three rooms adjoining on the same side are used by them as bedrooms, and they use a building in the rear of the main building as kitchen and dining-room; that defendants use a room in front on the west side of the building as a parlor, and two rooms, one in the rear on the west side as a bedroom, and the other rear room on said floor as a kitchen and dining-room, which last rooms were constructed with two sets of doors, to keep offensive smells from the kitchen from the other part of the house, and that there are also a partition and door across the hallway for the same purpose; that when said doors of the kitchen and hall are kept properly closed, no offensive smells can pass from the kitchen on the second floor into the rooms in front, but all such offensive odors pass out the corridor in the kitchen; that plaintiff's wife had been a great sufferer from neuralgia, is in feeble health, and very nervous and excitable, and is now and almost constantly subject to severe attacks of neuralgia, and any unusual noise or confusion produces upon her severe nervous attacks, which require the continual care and attention of the doctor to alleviate her suffering; that during the past two months the defendants have maliciously and willfully inaugurated a system of conduct in the use of their rooms for the avowed purpose and object of driving the plaintiff from the rooms, which he and his family occupy, and make living in them impossible; and the defendants threaten to continue

their willful and malicious annoyance, and make the living in said rooms so disagreeable and uncomfortable that, to preserve their health and comfort, they will have to abandon their dwelling-rooms aforesaid, unless defendants are restrained from continuing their malicious and offensive conduct and doings, which are unnecessary and uncalled for in domestic life.

The bill then proceeds to specify the offensive conduct, among them impolite hailing of Mrs. Medford by Mrs. Levy, as "Good by, Sal!" "Hello, Sal!" "Chestnut!" and like sayings; that such remarks are made and persisted in for the purpose of annoying, exciting, and maligning the wife of plaintiff, and without any provocation on the part of Mrs. Medford, and that she is thereby annoyed and excited to such an extent as to interfere with their enjoyment of their rooms; that defendants, while their meals are being prepared, instead of keeping the doors closed, and allowing the kitchen odors to escape into the outside air,—an arrangement which is amply provided for in the construction of the house,—throw open the doors leading from the kitchen to the hall, thus filling the whole house with objectionable odors, owing to the frequent cooking of cabbage, onions, and other things, the odor of which is particularly nauseating to the wife of plaintiff in her present enfeebled and excited condition, and has the effect of making her sick, and rendering her said rooms unfit for the reception of company, and in many other ways interfering with her free and perfect enjoyment of her said rooms, and that the said defendants, although knowing that this can be avoided, persist in these things for the purpose of annoying plaintiff and his wife; that said defendants are in the habit of throwing old boots and shoes and socks and other objectionable things into the yard, sweeping dirt out of the rooms which defendants occupy into the halls and stairways, and allowing it to remain there a long time, cleaning shoes, shaking clothes, carpets, and rugs in the hall, thereby filling it with dust, and the floors with dirt, which they do not sweep up and carry away, but allow to remain, thereby adding to the dirt already accumulated; that all these things are very disagreeable, annoying, and insufferable to your said plaintiff, and especially to his wife, whose habits are those of a neat and tidy housewife, and that they are a matter of great embarrassment to her in the presence of visitors; disagreeable smells make plaintiff's wife nervous, bring on attacks of neuralgia, and

thereby affect her health, and thereby destroy the peace and comfort of plaintiff's home; that all these acts are wholly unnecessary on the part of the defendants, but that they persist in them on account of their untidy habits, of which plaintiff and his wife were both ignorant before renting the property to said Levy, and also for the purpose of annoying plaintiff and his wife, of making their rooms as uncomfortable as possible, and of causing them finally to vacate the rooms, which they will be compelled to do, unless the defendants are restrained; that instead of passing through the halls quietly, and not making any more noise than necessary, the defendants engage in loud talking, singing and whistling, stamping and dancing, in the halls and rooms; that they make excessive and unnecessary noise with coal-buckets and by slamming doors; that these noises are not made from any necessity, or even thoughtlessly, but for the express purpose of exciting, annoying, and vexing and reviling the plaintiff and wife, and owing to her nervous organization and feeble health, they do annoy, excite, and vex plaintiff's wife, and at times completely prostrate her with nervous attacks, and impair her peace of mind, and completely unfit her for her duties, and interfere with plaintiff's enjoyment of domestic life; that they have thrown dirty water out of the windows, purposely spilled water on the stairs, and left it there, annoying the plaintiff and his wife, and damaging his property; that they are in the habit of leaving doors open when they ought to be closed, and closing them when they ought to be open, wiping their feet on the newspaper of plaintiff left at the door, sweeping dirt under doors, and throwing it through transoms over which they have no control, and thereby excessively annoying and irritating plaintiff and his wife, and seriously interfering with their happiness, and the perfect enjoyment and comfort of their home. The prayer of the bill is, that defendants, etc., be enjoined "from doing the acts above mentioned and enumerated, or any one or more of them, or from doing anything else done for the purpose of annoying, exasperating, or reviling your said complainants, or either of them, or in any other manner calculated to disturb them in the full and perfect and quiet enjoyment and comfort of their said home," etc.

The injunction was granted in vacation, and was as follows: "An injunction is granted the complainants against Joseph Levy and C. Levy, his wife, as prayed for in the within bill, enjoining, restraining, and inhibiting the said Levys, their ser-

vants or agents, from making loud, boisterous, and unnecessary noises in the use of the rooms and halls of the tenement now occupied by them on the same floor of the building with the complainants, on the south side of Third Avenue, between Ninth and Tenth streets, in the city of Huntington, and which building is No. 935 Third Avenue; and from using scurrilous and offensive language in the presence or hearing of the female complainant, intended or calculated to annoy, disturb, or fret the female complainant; and from leaving open the hall-doors during the cooking of meals in the kitchen; and from leaving in the halls and stairways sweepings, dirt, old clothes, or other objectionable matter, calculated to offend the sight or smell of the complainants, occupants; and from generally so conducting themselves in the use of the rooms as to unnecessarily annoy and make the other occupants on the said floor uncomfortable, as complained of in the said bill, until the further order of the court," etc.

The injunction was not to take effect until bond in the penalty of two hundred dollars was given. The bond was given as required. On the twenty-eighth day of March, 1887, the defendants appeared and demurred to the bill for want of equity. The complainants joined in the demurrer, and it was set down for argument. The defendants answered, denying the allegations and charges of the bill. A great number of depositions were taken on both sides, and on the tenth day of January, 1888, the cause was heard on the bill, answer, replication, and depositions, and the court perpetuated the injunction, with costs. From this decree the defendants appealed.

The first error assigned is, that the court did not act on the demurrer; second, that the court erred in not sustaining the demurrer to the bill; and third, that the court erred in perpetuating the injunction.

The court did act on the demurrer by its final decree, because it held the bill sufficient, and necessarily overruled the demurrer. Ought the demurrer to have been sustained? It is charged in the bill "that the defendants have willfully and maliciously inaugurated a system of conduct in the use of their rooms . . . for the avowed purpose and object of driving the complainants from their rooms, and make the use thereof impossible," and threaten to continue the same. The bill then proceeds to set forth the grievances of complainants.

The current of the authorities seems to be, that if any one

does a lawful act on his own property, the motive for the act is in law a matter of indifference: *Frazier v. Brown*, 12 Ohio St. 294; *Walker v. Cronin*, 107 Mass. 564; *Panton v. Holland*, 17 Johns. 91; 8 Am. Dec. 369; *Mahan v. Brown*, 13 Wend. 261; 28 Am. Dec. 461; *Phelps v. Nowlen*, 72 N. Y. 39; 28 Am. Rep. 93; *Chatfield v. Wilson*, 28 Vt. 49.

In *Carrington v. Taylor*, 11 East, 571, it was held that firing at wild fowl, to kill and make profit of them, by one who was at the time in a boat on a public river or open creek, where the tide ebbs and flows, so near to the ancient decoy on the shore (about two hundred yards) as to make the birds there take flight, the defendant having before fired at a greater distance from the decoy, which brought out some of the birds from thence, though he did not fire into the decoy-pond, is evidence of a willful disturbance of and of damage to the decoy for which an action on the case is maintainable by the owner.

In *Greenleaf v. Francis*, 18 Pick. 117, it was held that in the presence of all rights acquired by grant or adverse use for twenty years the owner of land may dig a well on any part thereof, notwithstanding he thereby diminishes the water in his neighbor's well, unless in so doing he is actuated by a mere malicious intent to deprive his neighbor of water.

In *Trustees v. Youmans*, 50 Barb. 316, it was held that no action will lie for injuries caused by cutting off subterranean waters percolating the soil or running through unknown channels, and without a distinct or defined course; but it was further held that an exception exists in case of an injury done by cutting off such waters with malice; that no person can wantonly and maliciously cut off on his own land the underground supply of a neighbor's spring or well without any purpose of usefulness to himself. To the same effect is *Haldeman v. Bruckhart*, 45 Pa. St. 514; 84 Am. Dec. 511; *Wheatley v. Baugh*, 25 Pa. St. 528; 64 Am. Dec. 721.

In the well-considered case of *Chesley v. King*, 74 Me. 164, it was held that if an owner of ground should dig a well thereon for the sole purpose of inflicting damage upon a party who had rights in a spring, he would be liable in damages. The court in that case said: "In view of the numerous cases where the commission of a lawful act does become actionable by the mere carelessness of him who does it, when it results in damage to innocent parties, it sounds strangely to say that its commission for the sole purpose of inflicting damage upon another, and without any design to secure a benefit to its doer

or others, is not actionable when the damage intended is thereby actually caused. We rather incline to the view that there may be cases where an act, otherwise lawful, when thus done, may combine the necessary elements of an actual or legal damage to the plaintiff, and a wrongful act committed by the defendant, or in other words, may be an invasion of the legal rights of another, accompanied by damages. One of the legal rights of every one, in a civilized community, would seem to be security in the possession of his property and privileges against purely wanton and needless attacks from those whose hostility he may have in some way incurred."

Every family possesses under the law the legal right to security in its home; to have peace, quiet, and comfort against purely wanton and needless attacks from those whose hostility they may have in some way incurred. Other families, even those whose hostility they may have incurred, have also the right to the privileges of a home, the right to talk, even loudly, and to sing loudly and dance; to open and shut doors; and it may be that they would not always be expected to use great care in the manner of opening and closing doors; to cook their food, and for their comfort to even keep the door of the kitchen open while the food was being cooked and prepared for the table; but they have no right wantonly and needlessly to do any or all these things in an unusual manner for the mere purpose of annoying and rendering uncomfortable their neighbors; and while, under other circumstances, the doing of these things in the manner indicated would not amount to a private nuisance, yet when they are done for the malicious or willful purpose of annoying a neighbor, and they have such an effect, and makes the neighbor's home uncomfortable, the doing amounts to a nuisance.

While there are some things alleged in the bill, as sweeping the dirt into the hall and talking offensively, which would not amount to a nuisance, yet the charge that, for the mere willful and malicious purpose of annoying and making uncomfortable the plaintiffs, they, by loud talking, singing and dancing, and permitting offensive odors to escape from the kitchen through doors left open for the purpose, did render the home of the plaintiff materially uncomfortable, presents a proper case for the interposition of a court of equity. The bill was sufficient.

Was the decree proper under the pleadings and proof? The case presented here is happily of rare occurrence. No case like it has been cited in the argument of counsel. It is

the first case I have ever seen where there was trouble between two private families originating between the mothers respectively, and a court of equity asked to interfere with its strong arm to protect one against the other. It is to be hoped no such case will again occur; and while, as we have held, the bill presents a case of which the court under the established principles of equity must take cognizance, yet it would not perpetuate the injunction unless the proof was clear and strong. The court will discourage, as far as it can, a resort to its power for the purpose of interfering in mere domestic broils. We do not wish the idea to obtain that if there is a quarrel between two women, and both become excited and nervous, and things are done and said which are unseemly, and their domestic peace and happiness is thus destroyed, either can with ease and dispatch prevail upon a court of equity, which is busy over more weighty matters, to interfere and preserve the peace and quiet of the homes of either.

The proof here shows that these two women had for ten months lived together, using the same stairs and hall without trouble, when one wanted to exchange kitchens with the other, which was declined. Then the trouble commenced, and was endured for about two months, when the bill was filed, and the injunction obtained. The plaintiffs were both examined in their own behalf, together with a Miss Worten and a Miss Roberts, girls who had lived with them, and these give evidence which substantially sustains the allegations of the bill, and a Mr. McDowell, who testified to loud singing in the hall, and the doors shut hard; could smell onions cooking, and the smell was disagreeable. He was there on two occasions. Drs. Aldrich, Mayo, and Buffington, who attended Mrs. Medford at different times, were also examined. Dr. Aldrich was called in but once. Found her nervous, and in mental distress. Did not know the cause. Dr. Mayo saw her once. Found her in considerable excitement, and she had a severe headache. Did not know the cause. Dr. Buffington went to see her twice. Found her in a very nervous state. Is subject to shortness of breath and palpitation of the heart. Not one of these physicians was asked as to noises and odors in the house. A Miss Via also testified she heard some loud singing by Mrs. Levy. Mrs. Levy was in her own kitchen while singing. Mrs. Burdick, the only other witness for plaintiffs, testified to being at Mrs. Medford's on one occasion, and there was a very offensive odor in the hall. Said

she could not tell what it smelled like, but thought it was caused by the cooking of kraut. On cross-examination, Mrs. Medford and Mr. Medford both admit they said nothing to the Levys about their annoying them by the noise or odors.

Mrs. Levy, in her deposition, says that she said to Mrs. Medford before they went there: "Mrs. Medford, consider what you are doing when you give up your kitchen. Remember you are giving up your best and most useful room, and don't repent of it when it is too late." She further said that, in December, Mrs. Medford came to her and said: "Mrs. Levy, how would you like to have the rooms downstairs?" (A small frame building in the yard, which they were using as dining-room and kitchen.) "I asked her what she meant. She said: 'If you will give me your kitchen, I will give you the two rooms downstairs.'" Mrs. Levy says she afterwards informed her Mr. Levy was not willing to make the change. At this she became very angry, and said it was very inconvenient the way she was situated, and if she had the room she could dispense with a girl, and do her own work. The evidence for the defense shows that, after the disagreement about the kitchen, the trouble grew worse, until it culminated in an encounter between the two women. The Levys, in their depositions, say Mrs. Medford swept dirt into the hall, and slammed doors; that they cooked as other people, and ate what other people ate; that Mrs. Medford cooked upstairs, with the door open; that it was of no avail to close the kitchen door, for the transom was broken, and could not be shut. They are corroborated by Miss Lavine.

Dr. Mayo says he was called to see Mrs. Levy, and found her suffering from nervous prostration. The women had much trouble about who should clean the halls, etc.

John Ran says he is a barber, and lives next door to the Medfords. Said he heard a little singing, but it was not loud and boisterous.

Dr. Buffington, who was also sworn for plaintiffs, says, at the time he visited Mrs. Medford, he heard no unusual noises coming from Levy's apartments, such as loud singing, whistling, dancing, stamping, or slamming doors, as he recollects; that he has no recollection of smelling any bad odors.

A. M. Thomas was a hotel-keeper within thirty feet of the Medfords. Said he had heard no unusual noises coming from the apartment of the Levys, such as loud singing, dancing,

stamping, or slamming of doors; and that none of his guests had ever complained to him of such noises.

W. A. Gibson said he did business within twenty feet of the Levys, and that he could recall no unusual noises coming from their apartments.

I have referred to this much of the evidence to show the character of this unseemly controversy. There is an old maxim that he who comes into a court of equity must come with clean hands. Therefore, when there appears to be an unfortunate quarrel between two women which involves the families of each, and both are in fault, a court of equity will not interfere to protect one against the other, and enjoin as a nuisance what one does against the other. The decree of the circuit court is reversed, with costs, and the injunction is dissolved, and the bill dismissed.

NUISANCES. — Whether or not an encroachment upon a right, public or private, is a nuisance, is a question of fact which the jury must determine: *People v. Park etc. R. R. Co.*, 76 Cal. 156. Persons may act upon their own premises and use their own property as they see fit for their own comfort and convenience, but they must act in a legitimate manner, and are limited to a proper and lawful use even of their own property: *Trulock v. Merte*, 72 Iowa, 510; for, *Sic utere tuo ut alienum non laedas*: *Carson v. Godley*, 26 Pa. St. 111; 67 Am. Dec. 404. So where a man's privy-vault was within six inches of the cellar wall of his neighbor's store, and the filth therefrom percolated through, the nuisance was one which should be prevented: *Perrins v. Taylor*, 43 N. J. Eq. 128.

NUISANCES. — A street-railway may infringe upon the rights of a rival street-railway to such an extent that an injunction will issue to enjoin the interference: *Fort Worth etc. R'y Co. v. Queen City etc. R'y Co.*, 71 Tex. 165.

DISTURBING A PUBLIC CHURCH GATHERING by singing, when the singer, not intending to disturb, was merely taking a part in the song service, is not a nuisance: *State v. Linkhaw*, 69 N. C. 214; 12 Am. Rep. 645.

WHITE v. TENNANT.

[81 WEST VIRGINIA, 790.]

CHANGE OF DOMICILE, WHAT CONSTITUTES. — Where a person entirely abandons his former domicile in one state, with no intention of returning thereto, but with the intention of making his home at a fixed place in another state, the latter state becomes his domicile, notwithstanding the fact that upon reaching his intended home he immediately goes with his family to visit a neighbor in the former state, where he sickens and dies without ever returning to live at his new home.

LAW OF DECEDENT'S DOMICILE GOVERNS DISTRIBUTION OF HIS PERSONAL ESTATE, although he die in another state.

SUIT to set aside a decree of distribution. The opinion states the case.

P. H. Keck and J. M. Hagans, for the appellants.

Berkshire, Sturgiss, and Baker, and A. F. Haymond, for the appellees.

SNYDER, J. This is a suit, brought December, 1886, in the circuit court of Monongalia County, by William L. White and others against Emrod Tennant, administrator of Michael White, deceased, and Lucinda White, the widow of said Michael White, to set aside the settlement and distribution made by the administrator of the personal estate of said decedent, and to have the same settled and distributed according to the laws of the state of Pennsylvania, which state, it is claimed, was the domicile of said decedent at the time of his death. The plaintiffs are the brothers and sisters of the decedent, who died in this state intestate. On October 28, 1887, the court entered a decree dismissing the plaintiffs' bill, and they have appealed.

The sole question presented for our determination is, whether the said Michael White, at the time of his death, in May, 1885, had his legal domicile in this state or in the state of Pennsylvania. It is admitted to be the settled law that the law of the state in which the decedent had his domicile at the time of his death will control the succession and distribution of his personal estate. Before referring to the facts proved in this cause, we shall endeavor to determine what in law is meant by "domicile."

Dr. Wharton says: "'Domicile' is a residence acquired as a final abode. To constitute it there must be, — 1. Residence, actual or inchoate; 2. The non-existence of any intention to make a domicile elsewhere": Wharton's Conflict of Laws, sec. 21. "'Domicile' is that place or country either, — 1. In which a person in fact resides with an intention of residence, — *animus manendi*; or 2. In which, having so resided, he continues actually to reside, though no longer retaining the intention of residence, — *animus manendi*; or 3. With regard to which, having so resided there, he retains the intention of residence, — *animus manendi*, — though he in fact no longer resides there": Dicey on Domicile, 44. Two things must concur to establish domicile, — the fact of residence, and the intention of remaining. These two must exist, or must have existed, in combination. There must have been an actual

residence. The character of the residence is of no importance; and if domicile has once existed, mere temporary absence will not destroy it, however long continued: *Munro v. Munro*, 7 Clark & F. 842. The original domicile continues until it is fairly changed for another. It is a legal maxim that every person must have a domicile somewhere; and he can have but one at a time for the same purpose. From this it follows that one cannot be lost or extinguished until another is acquired: *Baird v. Byrne*, 3 Wall. Jr. 1. When one domicile is definitely abandoned, and a new one selected and entered upon, length of time is not important; one day will be sufficient, provided the *animus* exists. Even when the point of destination is not reached, domicile may shift *in itinere*, if the abandonment of the old domicile and the setting out for the new are plainly shown: *Munroe v. Douglass*, 5 Madd. 405. Thus a constructive residence seems to be sufficient to give domicile, though an actual residence may not have begun: Wharton's Conflict of Laws, sec. 58. A change of domicile does not depend so much upon the intention to remain in the new place for a definite or indefinite period as upon its being without an intention to return. An intention to return, however, at a remote or indefinite period to the former place of actual residence will not control, if the other facts which constitute domicile all give the new residence the character of a permanent home or place of abode. The intention and actual fact of residence must concur, where such residence is not in its nature temporary: *Hallet v. Bassett*, 100 Mass. 170, 171; *Long v. Ryan*, 30 Gratt. 718. In *Bradley v. Lowery*, 1 Speers Eq. 1, it is held that "change of domicile is consummated when one leaves the state where he has hitherto resided, avowing his intention not to return, and enters another state intending to permanently settle there." A domicile once acquired remains until a new one is acquired elsewhere *facto et animo*: Story's Conflict of Laws, sec. 47; *Hart v. Lindsey*, 17 N. H. 235; 43 Am. Dec. 597. Where a person removes from one state to another, and establishes a fixed residence in the latter, it will become his domicile, although there may be a floating intention to return to his former place of abode at some future period: *Ringgold v. Barley*, 5 Md. 186; 59 Am. Dec. 107. "If a man, intending to remove with his family, visits the place of removal beforehand to make arrangements, or even sleeps there occasionally for convenience, and then transfers his family, the change of domicile takes effect from the time of

removing with the family; but if he has definitely changed his residence, and taken up his abode permanently in a new place, the fact that his family remains behind until he can remove them conveniently, and that he visits them occasionally, will not prevent the new place being his domicile": *Guier v. O'Daniel*, Am. Lead. Cas. (753), 903; *Cambridge v. Charlestown*, 13 Mass. 501.

The material facts in the case at bar are as follows: Joseph S. White, the father of the plaintiffs and Michael White, died intestate in Monongalia County, seised of a tract of about 240 acres of land, of which about 40 acres lay in Greene County, Pennsylvania, the whole constituting but one tract or farm. The mansion-house in which the father resided was located on the West Virginia side of the farm, and there was also a dwelling-house, generally occupied by tenants, on the Pennsylvania part of the farm. After the death of the father, his widow and the plaintiffs remained together and occupied the home farm, residing in the mansion-house in West Virginia. Michael White, several years before his death, married the defendant Lucinda White, a daughter of the defendant Emrod Tennant, and about that time purchased a farm on Day's Run, in Monongalia County, some fifteen miles from the home place, to which he moved, and at which he and his wife resided. It is conceded that Michael was born and had his domicile in West Virginia all his life, until about April 1, 1885.

In the winter of 1884-85, Michael sold his Day's Run farm, and then rented or made an arrangement with his mother and brothers and sisters, the plaintiffs, to occupy the forty acres of the home farm, in which he still had an undivided interest, and to live in the house on said forty acres in Greene County, Pennsylvania. He was to give to the purchaser the possession of his Day's Run farm on April 1, 1885, and to have possession of the Pennsylvania house and forty acres at the same time. In March, 1885, he moved part of his household goods into the Pennsylvania house, and put them into one of the rooms by permission of the tenant, who then occupied it, and who did not vacate it until between the middle and last of March, 1885. About the same time he moved an organ and some grain to the old homestead, until he could get possession of the Pennsylvania house.

On the morning of April 2, 1885, he finally left the Day's Run house with the remainder of his goods and his wife, he

having no children, with the declared intent and purpose of making the Pennsylvania house his home that evening. He, with his team, wife, and goods, and live-stock, passed into the state of Pennsylvania several miles before he reached said house, and continued in said state thence to said Pennsylvania house, where they arrived that evening about sundown, and then and there unloaded their goods and put them in the house, setting up one bed, and turning the fowls and other live-stock loose at the house.

The said house had been vacated for several days. It was a damp, cool day, and the house was found to be damp and uncomfortable. The wife was complaining of feeling unwell, and in consequence of that fact and the uncomfortable condition of the house, on the invitation of her brother-in-law and others of the family, who then resided at the mansion-house, but a short distance therefrom, the said Michael and his wife went to the mansion-house in West Virginia to stay all night and return in the morning. Before leaving the Pennsylvania house, the wife had gotten out of the buggy at the house, and the said Michael, after putting into it his household goods, locked the door, and took the key with him. On the following morning, the wife still feeling unwell, and the brother, who was to return the team which they had used in moving their goods, having taken sick, the wife, after going to the Pennsylvania house to milk, returned to the mansion-house, and Michael took the team back to Day's Run.

On the return of Michael from this trip, he found his wife so sick with typhoid fever that it was impossible to move her, in consequence of which both he and she remained at the mansion-house,—she because she was unable to get away, and he to wait on her,—but he went daily over to the Pennsylvania house to look after it, and to feed his stock there, calling it his "home." In ten or fifteen days, and before the wife had sufficiently recovered to leave her bed, Michael was attacked with typhoid fever, and about ten days thereafter died intestate in the same house. The wife recovered, and the defendant Emrod Tennant, her father, administered on the estate of Michael, taking out letters of administration in Monongalia County, West Virginia. The administrator settled his accounts before a commissioner of said county, and distributed the estate according to the laws of West Virginia,—that is, by paying over to the widow the whole personal estate remaining after the payment of the debts of the decedent. It is ad-

mitted that if the distribution had been according to the laws of the state of Pennsylvania, the wife would have been entitled to the one half only of said estate, and the plaintiffs would have been entitled to the other half.

As the law of the state in which the decedent had his domicile at the time of his death must govern the distribution of his estate, the important question is, where, according to the foregoing facts, was the domicile of Michael at the time of his death? It is unquestionable that prior to the second day of April, 1885, his domicile was and had been in the state of West Virginia. Did he on that day or at any subsequent day change his domicile to the state of Pennsylvania? According to the authorities hereinbefore cited, if it is shown that a person has entirely abandoned his former domicile in one state with the intention of making his home at a fixed place in another state, with no intention of returning to his former domicile, and then establishes a residence in the new place for any period of time, however brief, that will be in law a change of domicile, and the latter will remain his domicile until changed in like manner.

The facts in this case conclusively prove that Michael White, the decedent, abandoned his residence in West Virginia with the intention and purpose not only of not returning to it, but for the expressed purpose of making a fixed place in the state of Pennsylvania his home for an indefinite time. This fact is shown by all the circumstances as well as by his declarations and acts. He had sold his residence in West Virginia, and surrendered its possession to the purchaser, and thereby made it impossible for him to return to it and make it his home. He rented a dwelling in Pennsylvania, for which he had no use except to live in and make it his home. In addition to all this, he had moved a part of his household goods into this house, and then, on the 2d of April, 1885, he with his family and the remainder of his goods and stock finally left his former home and the state of West Virginia, and moved into the state of Pennsylvania to his house in that state, and there put his goods in the house, and turned his stock loose on the premises. At the time he left his former home on that morning, and while he was on the way to his new home, his declared purpose and intention were to make that his home from that very day, and to occupy it that night. He arrived in Pennsylvania and at his new home with that intention; and it was only after he arrived there, and

for reasons not before known, which had no effect to change his purpose of making that his future home, that he failed to remain there from that time. There was no change in his purpose, except that after he arrived at his new home, and unloaded and left his property there, he concluded, on account of the condition of the house and the illness of his wife, that it would be better to go with his wife to remain one night with his relatives and return the next morning.

When he left his former home without any intention of returning, and in pursuance of that intention did in fact move with his family and effects to his new home, with the intention of making it his residence for an indefinite time, it is my opinion that when he and his wife arrived at his new home it became *eo instanti* his domicile, and that his leaving there under the circumstances with the intention of returning the next day did not change the fact. The concurrence of his intention to make the Pennsylvania house his permanent residence, with the fact that he had actually abandoned his former residence, and moved to and put his goods in the new one, made the latter his domicile.

According to the authorities hereinbefore referred to, he must of necessity have had a domicile somewhere. If he did not have one in Pennsylvania, where did he have one? The fact that he left the Pennsylvania house, after he had moved to it with his family and goods, to spend the night, did not revive his domicile at his former residence on Day's Run, because he had sold that, and left it without any purpose of returning there. By going from his new home to the house of his relatives to spend the night he certainly did not make the house thus visited his domicile; therefore, unless the Pennsylvania house was, on the evening of April 2, 1885, his domicile, he was in the anomalous position of being without a domicile anywhere, which, as we have seen, is a legal impossibility; and that house having become his domicile, there is nothing in this case to show that he ever did in fact change or intend to change it, or to establish a domicile elsewhere.

It follows, therefore, that that house remained his domicile up to and at the time of his death; and that house being in the state of Pennsylvania, the laws of that state must control the distribution of his personal estate, notwithstanding the fact that he died in the state of West Virginia.

For these reasons the decree of the circuit court must be reversed, and the cause must be remanded to that court to be

there further proceeded in according to the principles announced in this opinion and the rules of courts of equity.

DOMICILE—**WHAT CONSTITUTES**: Extended note to *Ringgold v. Barley*, 49 Am. Dec. 111-115. Residence and intention to remain must both concur in order to establish domicile: *Hairston v. Hairston*, 27 Miss. 704; 61 Am. Dec. 530; *Gilman v. Gilman*, 52 Me. 165; 83 Am. Dec. 502. But a legal residence must be carefully distinguished from an actual residence: *Tipton v. Tipton*, 87 Ky. 243; *Larique v. Wife*, 40 La. Ann. 457.

WHAT CONSTITUTES ABANDONMENT OF RESIDENCE.—The shortest absence, if intended as a permanent abandonment, is sufficient, although the party may soon afterwards change his intention; but a protracted absence, intended only as a temporary absence, followed by a resumption of a former residence, is not an abandonment: *Kreitz v. Behrensmeyer*, 125 Ill. 141; 8 Am. St. Rep. 349.

ESTATES OF DECEDENTS.—The law of the domicile of the deceased governs the distribution of his estate: *Wheeler v. Hollis*, 19 Tex. 522; 70 Am. Dec. 363; *Townes v. Durbin*, 3 Met. (Ky.) 352; 77 Am. Dec. 176; *Estate of Harlan*, 24 Cal. 182; 85 Am. Dec. 58; *Petersen v. Chemical Bank*, 32 N. Y. 21; 88 Am. Dec. 298.

MILLER v. COAL COMPANY.

[21 WEST VIRGINIA, 836.]

LIABILITY OF CORPORATION FOR TORT COMMITTED AFTER EXPIRATION OF ITS CHARTER.—A private business corporation duly organized and incorporated under the laws of West Virginia, which continues its corporate business in its corporate name after the time fixed by its charter for its duration has expired, can be sued and made liable as a corporation *de facto* for a tort committed by it after its charter has expired. And its directors and stockholders, by failing to wind up its business when the charter expires, cannot relieve it from liability for acts done in its name during its actual existence as such *de facto* corporation.

PLEA THAT CORPORATION DEFENDANT HAS CEASED TO EXIST IN LAW is insufficient. To be sufficient, it must further aver that it had ceased to exist in fact at the time when the alleged cause of action arose.

TRESPASS on the case. The opinion states the facts.

S. P. McCormick and P. J. Crogan, for the plaintiff in error.

J. W. Mason, for the defendant in error.

SNYDER, J. Action of trespass on the case, commenced December 29, 1886, in the circuit court of Preston County, by Elizabeth A. Miller, administratrix of Daniel Miller, deceased, against the Newburg Orrel Coal Company, to recover damages under our statute from the defendant for its negligence resulting in an explosion in its coal mine, whereby the plaintiff's intestate, an employee of the defendant, was killed.

The declaration avers that the defendant is an incorporated company, and the action is against it as such. The defendant filed a plea alleging that it was organized and became a body corporate on June 15, 1855, by virtue of an act of the general assembly of Virginia, for the purpose of mining coal in Preston County, and so continued for the period of twenty years, or until June 15, 1875, when its charter expired, and all rights, powers, and ability to create liabilities as such corporation ceased and determined; and that all its property and assets by operation of law passed into the hands of C. Oliver O'Donnel, Robert T. Baldwin, Alford Jenkins, John Stewart, and Otho H. Williams, who composed the board of directors of the corporation then in office; and that at the time of committing the wrongs complained of in the plaintiff's declaration its power and ability to create any liability had ceased, etc.

To this plea the plaintiff demurred, and also tendered a special replication, in which she averred that on June 15, 1875, and ever since that time, the defendant continued to act and operate its coal mine as such corporation; that it was so acting at the time of the injury complained of, and is still so acting and holding itself out to the public; and that in fact it has never ceased its corporate business or parted with its property or closed up its affairs, etc. This replication was, on the motion of the defendant, rejected, and the plaintiff excepted. The order then concludes as follows: "And the court, being of opinion that the said plea is sufficient in law, doth therefore consider that the demurrer be overruled; and the plaintiff not desiring to reply further, it is accordingly considered by the court that the plaintiff's writ be quashed, and that defendant recover from the plaintiff its costs."

To this judgment the plaintiff obtained this writ of error.

This judgment is peculiar, because the overruling of the demurrer to the plea did not dispose of the questions of fact presented by the plea as well as the declaration. It may, however, be considered that the plaintiff, by declining to further reply to the plea, by general replication thereto or otherwise, abandoned his action, and thereby authorized its dismissal. As no question has been raised to this seeming irregularity, by any party, either in the assignment of error or the argument, we do not deem it necessary to do more than refer to it, for the reason that the judgment must be reversed upon another ground.

The important question to be determined in this case is,

whether or not a duly incorporated and organized corporation, which continues its corporate business in its corporate name after the time fixed by its charter for its duration has expired, can be sued and made liable as a corporation *de facto* for a tort committed by it after the limit fixed by its charter had expired. At common law, upon the death or dissolution of a corporation, its real estate reverted to the grantors or donors, and its personal property escheated to the king, while the debts due to and from it were thereby extinguished, and all actions pending for or against it at the time abated: *Rider v. Nelson etc. Factory*, 7 Leigh, 154; 30 Am. Dec. 495; *Board v. Livesay*, 6 W. Va. 44; *Mumma v. Potomac Co.*, 8 Pet. 281. But this doctrine had its origin when corporations were either municipal or ecclesiastical, and private business and commercial corporations were unknown.

Upon the dissolution of these old public corporations, their real estate, which was usually acquired as a donation to public or pious uses, was held to revert, upon the cessation of the use to the donors, and their personal property to escheat to the king, for the want of owners. In these cases there were no stockholders or natural persons who were entitled, equitably or otherwise, to the assets of the deceased corporation, and, as in the case of an individual dying without heirs, the personalty went to the king, but to prevent the realty from escheating to the king, it was held to revert to the donor, upon the theory that the grant, being made to corporation for a public or charitable use, was made only for its life. But this rule, so far as modern business and commercial corporations are concerned, has become practically obsolete. Its unjust operation upon the rights of creditors and stockholders has been generally prevented by statute, and in equity the assets of such a corporation, which represent, not the donations of the prince or its pious founder, but the contributions of its stockholders, are held, independent of statute, to constitute a trust fund, into whosoever hands they may come, for the benefit of the creditors and stockholders: *Curran v. Arkansas*, 15 How. 304; *Bacon v. Robertson*, 18 Id. 480.

Very soon after *Rider v. Nelson etc. Factory*, *supra*, was decided, and according to a suggestion of the court in that case, the general assembly of Virginia, at its session of 1836-37, passed an act which has ever since been in force. This statute, without material change, was incorporated in our code of 1868, and has continued to be, and still is, in force in this

state. It provides, in substance, that when a corporation shall expire or be dissolved, its property and assets shall, under the direction of the board of directors then in office, or such receiver as may be appointed by the circuit court, be subject to the payment of its liabilities, and the surplus, if any, shall be distributed among its stockholders. "And suits may be brought, continued, or defended; the property, real or personal, of the corporation be conveyed or transferred, under the common seal or otherwise; and all lawful acts be done, in the corporate name, in like manner, and with like effect, as before such dissolution or expiration; but so far only as shall be necessary or proper for collecting the debts and claims due to the corporation, converting its property and assets into money, prosecuting and protecting its rights, enforcing its liabilities, and paying over and distributing its property and assets, or the proceeds thereof, to those entitled thereto": Code, c. 53, sec. 59.

It is no doubt true that the legislature, in passing this statute, had special reference to winding up the affairs of defunct corporations, and disposing of their assets to those entitled thereto by proceedings in equity, and thus to destroy the common-law rule, which was regarded as unjust and inapplicable to modern private business corporations. But the terms employed in the statute do not confine its operation to equity proceedings. It provides in general terms that suits may be brought or defended in the corporate name with like effect as before the dissolution, so far as shall be necessary for collecting the debts and enforcing the liabilities of the corporation. This language is certainly sufficiently comprehensive to embrace any suit, whether in law or in equity, which may be proper for collecting the debts due to, or enforcing the liabilities against, the corporation; and this seems also to give effect to the general object and purpose of the statute. It was evidently intended to be for the benefit of the creditors of the corporation as well as for the stockholders and the corporation itself. If either had a cause of action which could, according to law and its rules of practice, be enforced only in a court of law, the purpose of this statute was manifestly to permit the bringing suit upon it in a court of law; for otherwise the general object of the statute could not be attained.

In respect to the Newburg Orrel Coal Company, — the corporation now in question, — there can be no doubt that it was the duty of the directors under the provisions of this statute

to wind up its business when its charter expired; but the facts show that they did not do so. On the contrary, the corporation continued to prosecute its business in its corporate name just as it had done before its charter expired. It continued to exist as a matter of fact after its franchise or legal right to exist had expired. It thus became a corporation *de facto*, but not *de jure*. As such *de facto* corporation it certainly possessed no special powers such as the power to condemn property and other like powers, which the law confers only upon corporations existing by legal right. But the courts cannot reasonably ignore the existence of such a corporation, if it is an immutable fact; nor are the acts and dealings had by and with it necessarily legally ineffective and of no binding force: 2 Morawetz on Private Corporations, secs. 1002, 1003; *Gas Light Co. v. City of St. Louis*, 11 Mo. App. 55; *Briggs v. Cape Cod S. Canal Co.*, 137 Mass. 71.

The scope of the powers of the officers and agents of a corporation *de facto* must be fixed in the same manner as in case of a corporation *de jure*. Therefore, if an association assumes to carry on business or enter into contracts in a corporate capacity under an expired charter, and those dealing with it treat it as if it were a corporation, the individual members of such association cannot be made liable, either severally or jointly, or as partners. This is equally true whether the association was in fact a corporation or not, or whether the dealing with the association in its corporate capacity was authorized by the legislature, or prohibited by law, and illegal. If an association assumes a liability, or enters into a contract as a corporation, it is clear the members of the association do not agree to be bound as individuals, either jointly or severally; nor do they agree to be bound as partners to each other or to those dealing with the association. It is equally true that the parties dealing or contracting with them do not intend to bind them individually. To treat the individuals as parties to such transaction would, therefore, involve, not only the nullification of the act which was actually contemplated by the parties on both sides, but the creation of a different obligation, which neither of the parties intended to make: 2 Morawetz on Private Corporations, sec. 748.

It is a general rule that a party who has contracted with an association assuming to be a corporation, and acting in a corporate capacity, cannot, after having received the benefit of the contract, set up as a defense to an action brought upon it

by the corporation that the latter was not a legal corporation, or had no authority to make the contract in a corporate capacity: *Brouwer v. Appleby*, 1 Sand. 158. This rule does not rest upon the doctrine of estoppel, as has sometimes been said, but is founded upon the policy of the common-law prohibition against unauthorized corporate action: *Bradley v. Ballard*, 55 Ill. 413; 7 Am. Rep. 656; *City of St. Louis v. Gas Co.*, 70 Mo. 69. The same rule is applicable in a suit brought against a corporation upon a contract which has been performed by the other party. A company which has entered into a contract in a corporate capacity cannot, after the contract has been performed by the other party, set up as a defense to an action for damages that it was not a *de jure* corporation: *Dooley v. Glass Co.*, 15 Gray, 494; *Manufacturing Co. v. Stuart*, 46 Mich. 482. The same rule applies in suits upon other classes of liabilities by or against *de facto* corporations: *Imboden v. Mining Co.*, 70 Ga. 86; 2 Morawetz on Private Corporations, secs. 751, 755; *Manufacturing Co. v. Bennett*, 28 W. Va. 16.

The principles, it seems to me, to be deduced from our statute and these authorities is, that a private business corporation acting and carrying on its corporate business in its corporate name after its legal existence has ended by the expiration of its charter must be held to be a corporation *de facto*; and that, as such, so long as it in fact so carries on its business and contracts or incurs liabilities with or to third persons dealing with it as such *de facto* corporation, it may sue and be sued at law, either in actions *ex contractu* or *ex delicto*, and it cannot defeat such action by alleging that its charter had expired before the cause of action arose. Its directors and stockholders, by failing to wind up its business when the charter expires, as it is their duty to do under our statute, cannot relieve the corporation from liability for acts done in its name and during its actual existence as a *de facto* corporation. In order to relieve it from liability, the corporation must have ceased to exist both in law and in fact. And consequently when it is sued as a corporation, a plea averring simply that it has ceased to exist in law or as a legal corporation will be insufficient, but it must aver also that it had ceased to exist in fact at the time the alleged cause of action arose.

It follows from these principles and this conclusion that the plaintiff in this case had the right to sue the defendant as a corporation; and that the plea of the defendant was bad, because it failed to aver, in addition to the facts that its charter

had expired and that it had ceased to be a corporation in law, the further fact that it had wound up its business and had ceased to exist in fact at the time the alleged cause of action arose. The circuit court, therefore, erred in overruling the demurrer to the defendant's plea and in giving judgment for the defendant. For this reason the judgment of the circuit court must be reversed, the plaintiff's demurrer to said plea sustained, and the case remanded to said court for further proceedings.

CORPORATIONS. — Persons who subscribe stock to and participate in an irregular formation of a corporation, under guise of the authority of statute, are a corporation *de facto*, and for many purposes as much liable as if a corporation *de jure*: *Marshall etc. Co. v. Killian*, 99 N. C. 501; 6 Am. St. Rep. 539.

CORPORATIONS. — **EFFECT OF A DISSOLUTION**, whether by repeal of its charter or otherwise: See extended note to *People v. O'Brien*, 7 Am. St. Rep. 717-725.

CORPORATIONS. — Stockholders who organize themselves into a corporation, transact business, and hold themselves out as a corporation, cannot, when sued as a corporation, set up as a defense that the organization of the corporation was irregular: *Aultman v. Waddle*, 40 Kan. 195.

CORPORATIONS. — Upon the dissolution of a private corporation, all actions at law pending against it abate: *Life Ass'n of America v. Goode*, 71 Tex. 90.

DEITZ v. INSURANCE COMPANY.

[81 WEST VIRGINIA, 851.]

STATEMENT OF FACTS FILED IN SUPPORT OF DECLARATION is to be considered as a part of the declaration; and it is proper practice to test by demurrer the sufficiency of the cause of action alleged in such statement and declaration.

EITHER AGENT OR PRINCIPAL MAY SUE UPON CONTRACT not under seal made by the agent in his own name for an undisclosed principal; and parol evidence is admissible to show that the principal is the real contracting party.

AGENT OF INSURANCE COMPANY IN PREPARING APPLICATION IS AGENT OF COMPANY. The agent of an insurance company who is authorized to procure applications for insurance and to forward them to the company for acceptance must be deemed the agent of the company in all he does in preparing the application or in any representation he may make as to the character or effect of the statement therein contained; and when, either by his instruction or direct act, such agent makes out an application incorrectly, notwithstanding all the facts are correctly stated to him by the applicant, the error is chargeable to the company. And this rule is not affected or changed by a stipulation inserted in the policy, subsequently issued, that the acts of such agent in making out the application shall be deemed the acts of the insured, unless written in the application

or expressed in the policy. Such stipulation does not convert the acts done for the insurer into the acts of the insured. Where, therefore, a husband, in making application for insurance on his wife's property, informs the company's agent, authorised to procure such applications, that the property belongs to his wife, but the agent, contrary to his instructions, and without his knowledge, makes out the policy in his name instead of that of his wife, the policy will be binding upon the company, and the husband may sue upon it in his own name for the use of his wife; and in such action parol evidence is competent to prove that the application was filled up by such agent, and that the facts were fully and correctly stated to him, but that he, without the knowledge of the insured, misstated them in the application.

ASSUMPART. The opinion states the case.

Knight and Couch, and S. Littlepage, for the plaintiff in error.

W. A. Quarrier, for the defendant in error.

SNYDER, J. This is an action by John K. Deitz for the use of Sarah E. Deitz against the Providence Washington Insurance Company, brought in the circuit court of Kanawha County. The declaration is in the form prescribed by our statute (Code 1887, c. 125, sec. 61), and alleges that the defendant, by virtue of the insurance policy herewith filed, owes the plaintiff \$1,995 for loss in respect to the property insured by said policy, caused by fire on or about April 15, 1887, at the premises described in said policy, and then concludes with a promise to pay said sum and refusal to do so, as is usual in actions of *assumpsit*.

The defendant demurred to this declaration, which demurrer the court overruled. The defendant then, under the provisions of section 62 of the statute, obtained from the court an order requiring the plaintiff to file a more particular statement in respect to his claim and the facts expected to be proved by him at the trial. In response to this order, the plaintiff filed a statement under oath, in which, among other things, he stated that Sarah E. Deitz, the person for whose use this action is brought, was at the time said insurance was effected, as well as at the time the loss occurred, the owner of all the property insured; that she was then and still is his wife; that he, acting as her agent, procured the insurance of her property, and informed the agent of the defendant, at the time the policy was taken or being made out, that all the property belonged to said Sarah E. Deitz, and instructed the defendant's agent at the time to make out the policy accordingly; that said agent, by mistake and oversight, made out the policy after receiving said

instructions, and after he, the plaintiff, had left his office, in the name of the plaintiff; that the policy was for some time kept by defendant's agent, and was then handed by him to the said Sarah E. Deitz, and by her laid away a short time before the fire; and that neither the plaintiff nor said Sarah discovered the mistake until after the fire.

The defendant thereupon demurred to the declaration and this statement filed in aid of it, and also moved the court to dismiss the plaintiff's action, which demurrer and motion the court sustained, and dismissed the action. The plaintiff has brought this writ of error.

The plaintiff contends that the court erred in dismissing the action. The defendant insists that the action of the court was right, because the facts set out by the plaintiff in his special statement show that he never had any insurable interest in the property or right of action on the policy. The policy is in the name of John K. Deitz, the plaintiff, and describes the property insured by it as belonging to him, and makes no mention of any interest in his wife or of his effecting the insurance as her agent. The policy also contains the following provisions:—

"If the assured shall make any false representation as to the character, situation, or occupancy of the property, or the interest of assured in the same, . . . or if the property be held in trust or on commission, or by leasehold or other interest not amounting to absolute or sole ownership, . . . it must be so represented to the company, and expressed in the policy in writing; otherwise the insurance as to such property shall be void." And also: "If any person other than the assured shall have procured this insurance to be taken by the company, such person shall be considered the agent of the assured, and not of this company; and this company shall not be bound by any act of or statement made to or by any agent or other person which is not contained either in the policy or in the written application upon which the insurance or any renewal is based."

The important question is, Whether or not, according to the facts thus appearing, the plaintiff has any right to maintain this action? I think this question is properly raised by the defendant's demurrer to the declaration and the plaintiff's statement filed in support thereof. The statement, being a specific averment of the facts intended to be proved to sustain the action, must be considered a part of the declaration; and

if it so modifies or contradicts the general averments of the declaration as to show that the plaintiff has no cause of action, it would be vain and useless to put the plaintiff to the proof of them, because that would be in effect to call upon him to prove facts which when proved would defeat his action. The demurrer at this stage of the proceedings is analogous to a motion to dismiss on the plaintiff's opening statement of his case, or according to the practice in this state, of moving the court to exclude the plaintiff's evidence: *Oscanyan v. Arms Co.*, 103 U. S. 261; *Dresser v. Transportation Co.*, 8 W. Va. 553; *Schwarzbach v. Ohio etc. Union*, 25 Id. 622; 52 Am. Rep. 227.

If we regard the declaration, the insurance policy, and the special statement together as containing the facts on which the plaintiff founds his claim, does he show a right to recover in this action? The defendant insists that the plaintiff's remedy is in a court of equity to reform the contract of insurance and correct the mistake in the policy. It is no doubt true that he has this remedy, but I do not think that it is his only remedy. It is a well-settled rule of law, that where a contract not under seal is made by an agent in his own name for an undisclosed principal, either the agent or the principal may sue upon it; the defendant in the latter case being entitled to be placed in the same situation at the time of the disclosure of the real principal as if the agent had been the contracting party. The rights and liabilities of a principal upon a written instrument executed by his agent do not depend upon the fact of the agency appearing on the instrument, but upon the facts,—(1) that the act is done in the exercise and (2) within the limits of the powers delegated to the agent, and these are necessarily open to inquiry by evidence.

In *Browning v. Insurance Co.*, L. R. 5 P. C. 263, it was held that where an insurance broker takes out a policy of insurance in his own name upon his principal's goods, the latter may sue upon the policy in his own name. In cases of this kind the liability of the principal, as well as the rights of the other party, depends upon the act done, and not merely the form in which it is executed. If the agent is clothed with the proper authority, his acts bind the principal, although done in his own name. The only difference is, that where the agent contracts in his own name for an undisclosed principal, who has employed him, he adds his own personal responsibility to that of his principal.

As to the admissibility of parol evidence to qualify the written contract, there is as much objection to letting it in for the purpose of enabling the principal not named in the contract itself to sue, as for the purpose of rendering him liable to be sued. But the true rule, it is submitted, is that parol evidence is admissible for the purpose of introducing a new party, but never for discharging an apparent party to the contract: *Jones v. Littledale*, 6 Ad. & E. 486; *Sims v. Bond*, 5 Barn. & Adol. 393. It is the constant course to admit parol evidence to show whether the contracting party is agent or principal: *Wilson v. Hart*, 7 Taunt. 295.

The agent's right to sue in his own name, where the instrument is in terms payable to him, is the same whether it be a promissory note, bill of exchange, check, bill of lading, policy of insurance, bond, and the like instances: 1 Wait on Actions and Defenses, 279, and cases cited. In *Colburn v. Phillips*, 13 Gray, 64, it is held: "An agent may sue on a written agreement made by him in his own name in behalf of his principal": *Rhoades v. Blackiston*, 106 Mass. 334; 8 Am. Rep. 333.

In illustration of this rule, Story on Agency, in section 161, says: "If an agent should procure a policy of insurance in his own name, for the benefit of his principal, the agent, as well as the principal, may sue thereon; for it is treated properly as a contract to which the principal, as well as the agent, is a party." In *Higgins v. Senior*, 8 Mees. & W. 834, 845, it is said: "There is no doubt that where such an agreement is made it is competent to show that one or both of the contracting parties were agents for other persons, and acted as such agents in making the contract, so as to give the benefit of the contract on the one hand to, and charge with liability on the other, the unnamed principals; and this, whether the agreement be or be not required to be in writing by the statute of frauds": Story on Agency, secs. 160, 270, and notes.

But it is insisted for the defendant that the plaintiff by the contract of insurance represented that he was the owner of the property, and as he had in fact no interest in the property, the contract is by the terms of the policy void. It is true that the policy is in the name of the plaintiff, John K. Deitz, and insures the property as his, and it is also true that the policy provides that if the property is held in trust, or be a leasehold or other interest not amounting to absolute or sole ownership, it must be so represented in the policy in writing, otherwise the insurance as to such property shall be void; but the state-

ment of facts filed by the plaintiff alleges that the plaintiff effected the insurance as the agent of the wife, the said Sarah E. Deitz, and at the time informed the agent of the defendant that the property belonged to his wife. In *Hunt v. Insurance Co.*, 22 Fed. Rep. 563, it was held: "Where a company's policies provide that 'any interest in property insured not absolute, or that is less than a perfect title, must be especially represented to the company and expressed in this policy in writing, otherwise the insurance shall be void,' it is the duty of the agent who makes the contract in behalf of the company, if he knows that the property upon which insurance is desired belongs to the applicant's wife, to state that fact in the policy, and if he fails to do so, the policy will not be invalid on that account." And in the same case it was further held that "a husband who has taken out insurance as his wife's agent upon her property in his own name may sue in his own name for her benefit in case of loss."

It is a general principle, well settled by the authorities, that agents of an insurance company authorized to procure applications for insurance, and to forward them to the company for acceptance, must be deemed the agents of the company in all they do in preparing the application, or in any representation they may make as to the character or effect of the statement therein contained; and when, either by his instruction or direct act, such agent makes out an application incorrectly, notwithstanding all the facts are correctly stated to him by the applicants, the error is chargeable to the company. This rule is not affected or changed by a stipulation inserted in the policy subsequently issued, that the acts of such agent in making out the application shall be deemed the acts of the insured unless written in the application or expressed in the policy. Such stipulation does not convert the acts done for the insurer into the acts of the insured: *Kausal v. Minnesota etc. Ass'n*, 31 Minn. 17; 47 Am. Rep. 776; *Poughkeepsie v. Insurance Co.*, 30 Hun, 473; *Rowley v. Insurance Co.*, 36 N. Y. 550; *Woodbury v. Insurance Co.*, 31 Conn. 417; Wood on Insurance, secs. 400, 401; *Schwarzbach v. Ohio etc. Union*; 25 W. Va. 622; 52 Am. Rep. 227; *Travis v. Insurance Co.*, 23 W. Va. 584, 598.

Parol evidence is competent to prove that the application was filled up by the agent of the company, and that the facts were fully and correctly stated to him, but that he, without the knowledge of the insured, misstated them in the applica-

tion. This is not a violation of the rule that verbal testimony is not admissible to vary a written contract. It proceeds upon the ground that the contents of the paper was not his statement, though signed by him, and that the company, by the acts of its agent in the matter, is estopped to set up that it is a representation of the insured: *Union etc. Ins. Co. v. Wilkinson*, 13 Wall. 222; May on Insurance, sec. 143, and cases cited.

These principles and these authorities are conclusive of the case at bar. The facts alleged in the plaintiff's special statement, if established by sufficient proof, would clearly show that the mistake in the policy was the act of the defendant, through its agent, and that the defendant cannot avoid its liability on account of such mistake. The judgment of the circuit court must, therefore, be reversed, the defendant's demurrer overruled, and the case remanded for further proceedings according to the principles announced in this opinion.

AGENT. — Where a contract has been made by an agent in his own name, but for the benefit of his principal, he may sue in his own name upon it: *Oremer v. Wimmer*, 40 Minn. 511. But an agent who loans the money of his principal in the name of the principal cannot himself sue to recover it back: *Chin Kem You v. Ah Joan*, 75 Cal. 124.

AGENT TREATED AS PRINCIPAL — INSURANCE. — Where an insurance agent is not required to consult his principal before making an insurance contract, he is regarded as though he himself were the principal: *Hartford Ins. Co. v. Haas*, 87 Ky. 531.

INSURANCE. — An insurance company is bound by the acts of its agent: *Menk v. Home Ins. Co.*, 76 Cal. 51; 9 Am. St. Rep. 158, and note 162, 163.

EFFECT OF STIPULATIONS IN A POLICY making the insurance agent the agent of the insured: *Continental Ins. Co. v. Pearce*, 39 Kan. 396; 7 Am. St. Rep. 557; note to *Clark v. Union Fire Ins. Co.*, 77 Am. Dec. 721.

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INSURANCE — AGENTS. — Where an agent authorized to take applications for insurance writes false answers to questions, without the knowledge of the applicant, or contrary to his directions, and the applicant makes the true answers to such questions, the company is estopped by the falsehoods of its agent: *Pickel v. Phoenix Ins. Co. of Brooklyn*, 119 Ind. 292. And to the same effect, substantially, is *Brown v. Commercial Fire Ins. Co.*, 86 Ala. 189.



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1. A GENERAL AGENCY EXISTS WHERE there is a delegation to do all acts connected with a particular trade, business, or employment. A special agency exists where there is a delegation to do a single act. *Great West Min. Co. v. Woodmas etc. Min. Co.*, 204.
2. NOTE SIGNED S. G. D., AGENT, must be treated as the note of S. G. D.; and parol evidence is not admissible to prove that it is the note of another person, unless that person carried on business in the name of such agent. In that event, the name of agent must be regarded as the business name of the principal. *Tarver v. Garlington*, 628.
3. AGENT WHO HAS RECEIVED MONEY GROWING OUT OF ILLEGAL CONTRACT may be compelled to pay it over at the suit of his principal. The law implies a promise on the part of the agent to pay over to his principal money received for him as such agent, and the illegality of the contract by virtue of which the money was collected affords no defense. *Floyd v. Patterson*, 787.
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 10. **AGENCY OR NOT IS QUESTION OF LAW** to be determined by the relations of the parties as they in fact exist under their agreements or acts. If relations exist between them which constitute an agency, it will be an agency, whether they understood it to be so or not. Their private intention will not affect it. *Id.*
 11. **CONTRACTS — DAMAGES RECOVERABLE ON REVOCATION OF.** — Where an agent has a contract with his principal to sell certain lands, to be disposed of within a time limited, and he is to receive as compensation for his services only a share of the profits arising from the proceeds of the sale, and in performance of such contract he renders services for several months, expending time and money, and the principal then revokes the contract without any reason or excuse, and refuses to permit him to further perform, the agent is entitled to recover such compensation in damages as would be equal in amount to his share of the profits which would have resulted had the lands been sold by him. *Durkes v. Gunn*, 300.
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14. **POWER OF ATTORNEY TO CONVEY LANDS NEED NOT DESCRIBE IN DETAIL** the lands authorized to be conveyed, and a power granted by wife to husband "to execute and acknowledge, sign, seal, and deliver any deed or deeds for the conveyance or assurance of all my right, title, and interest in and to any lands and tenements the title to which is in the said D. S. Munger, and in which I have any interest as being the wife of him, said D. S. Munger," is sufficient to authorize the conveyance of her interest in any lands then owned by D. S. Munger within the county where the power of attorney was recorded. *Id.*
15. **THAT AN AGENT WHO MADE A SALE OF REAL ESTATE WAS NOT AUTHORIZED IN WRITING** to do so is immaterial, if it was made in the presence of the principals at the request of one of them, and the money paid is at the same time handed to the other, and the purchaser takes possession under his contract, and makes valuable improvements with the knowledge of the principals, who instructed such agent to make out a contract of sale, and the latter, pursuant to such instruction, executed such contract. *Karns v. Olney*, 101.
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APPEAL AND ERROR.

1. **BILL OF EXCEPTIONS IN RECORD CANNOT BE CORRECTED IN SUPREME COURT AFTER CAUSE IS SUBMITTED.** — If, by any undue practice, the signature of the trial judge is procured to a bill of exceptions which he did not understand, and did not intend to sign, the trial court may, upon motion, even after adjournment for the term, and after the perfecting of an appeal to the supreme court, strike it from the record; and

- if the amendment be made after the transcript has been filed in the supreme court, the record may be corrected in the latter court by a suggestion of its diminution and a motion for a *certiorari*; but it cannot be corrected in the supreme court in the first instance, especially after the cause has been submitted. *East Line etc. R'y Co. v. Culberson*, 806.
2. **RESPONDENT SHOULD NOTIFY APPELLANT** of any additional grounds upon which he intends to rely in support of the judgment below. *Ex parte Dickinson*, 749.
 3. **INSTRUCTIONS**. — Exception taken to a detached portion of a charge to the jury cannot be sustained when the charge, taken together and considered as a whole, is consistent and proper. *State v. Turner*, 706.
 4. **IT IS ERROR TO PERMIT COUNSEL, IN ARGUING BEFORE JURY, TO STATE** and comment upon facts not in evidence, against the objection of the opposite party, and the error is not corrected by an instruction to the jury to disregard all statements of counsel not supported by evidence, unless it is found as a fact that the error was harmless, and that the legal right to a fair trial was not infringed. *Cross v. Grant*, 607.
 5. **ERROR IN GIVING INSTRUCTION WHICH MISSTATES LAW IS NOT CURED** by giving another instruction which correctly states it, because the court cannot say which instruction the jury will follow. *McClenehan v. Omaha etc. R. R. Co.*, 508.
 6. **SUPREME COURT WILL NOT REVERSE** a judgment upon grounds not taken in the court below, nor in the exceptions, unless for want of jurisdiction, but such court will affirm a judgment upon other grounds than those upon which it was based in the lower court. *Chapman v. City Council*, 581.
 7. **EVIDENCE**. — **ERROR IN PERMITTING INCOMPETENT TESTIMONY TO GO TO JURY** is cured, where the defendants go upon the stand as witnesses on their own behalf, and there give substantially the same evidence as that erroneously admitted in the first instance. *State v. Furney*, 262.
 8. **EVIDENCE**. — **DEPOSITIONS**. — **IT IS NOT ERROR TO PERMIT DEPOSITION TO BE READ IN EVIDENCE**, though taken in the same city where the trial was had, and only one day before the trial, and without any showing being made that the oral testimony of the witness could not be procured, where no objection was urged against it for these reasons, and the reasons given for the objection that was urged against the deposition were insufficient. *Missouri P. R'y Co. v. Neisonger*, 304.
 9. **DISQUALIFICATION OF JUROR NOT GROUND FOR NEW TRIAL WHEN**. — A new trial will not be granted on the ground of a juror's disqualification for a matter that is a principal cause of challenge, which existed before he was elected and sworn, but which was unknown to the party until after the trial, and which could not have been discovered by the exercise of ordinary diligence, unless it appears, from the whole case, that the party suffered injustice from the fact that such juror served upon the trial of the case. *Beck v. Thompson*, 870.
 10. **DEFECT IN CHARGE TO JURY IS NOT GROUND FOR REVERSAL** of the judgment, where the defect is not called to the attention of the court by an instruction supplying it. *Weaver v. Nugent*, 792.
 11. **RULING UPON ISSUES WITHDRAWN FROM JURY**. — A ruling upon a matter which was withdrawn from the jury in the charge is not ground for reversal of the judgment. *Id.*
 12. **REFUSAL TO TAKE INDICTMENT FROM JURY, NOT ERROR WHEN**. — Where, on the trial of a prisoner jointly indicted with two others, the indict-

ment, with an indorsement thereon of a verdict of a jury finding one of them guilty, is shown to the jury, and taken by them to the jury-room, it is not error for the court to refuse to send to the jury-room and take the indictment from the jury while they are deliberating. *State v. Shores*, 875.

12. REASONS GIVEN BY JUDGE FOR REFUSING NEW TRIAL. — If the refusal of a motion for a new trial be correct, the fact that the judge gave an erroneous reason for such refusal will not be a ground for reversing the judgment. *Galveston v. Hemmle*, 828.

See AGENCY, 9; HOMESTEAD, 1; LIS PENDENS; PLEADING, 7, 8, 10; PROCESS, 4, 5; TRIAL, 3, 8, 14.

ARREST.

1. WARRANT OF ARREST — SUFFICIENCY OF. — A warrant issued upon an original complaint on information and belief, but reciting that, upon examination under oath, it appeared to the justice that the offense had been committed, and that there was just cause to suspect the accused to be guilty thereof, is valid and legal, as the complaint presumptively shows a legal and proper ground for the issuance of the warrant. *Haskins v. Ralston*, 376.
2. WARRANT OF ARREST — SUFFICIENCY OF. — A warrant charging defendant with uttering and publishing as true a certain false, forged, and counterfeited note for the payment of money on a certain date, and describing the note, defendant well knowing at the time that said note was false, forged, and counterfeited, sufficiently describes the offense of forgery without averring an intent to defraud. *Id.*

See EXTRADITION, 1, 2.

ASSAULT AND BATTERY.

See DAMAGES, 4.

ASSIGNMENTS.

NOTICE — LIABILITY OF DRAWER. — An order on a fund operates as an assignment of so much of the fund due the drawer; but where the drawee pays the whole fund to the drawer, without actual personal notice of the assignment, such drawee is not liable to the assignee. In such case, notice to the husband of the drawee is not notice to her. *Harvin v. Galluchat*, 671.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

THE SOUTH CAROLINA ACT RELATING TO ASSIGNMENTS FOR THE BENEFIT OF CREDITORS applies as well to assignments made outside the state as to those made within it. *Ex parte Dickinson*, 749.

See CONFLICT OF LAWS, 1, 2; FRAUDULENT CONVEYANCES, 8, 9.

ATTACHMENT AND GARNISHMENT.

1. NON-RESIDENT. — A citizen of another state has the same rights as a citizen of this state, under the attachment law of South Carolina. *Ex parte Dickinson*, 749.
2. JUDICIAL WRIT OF ATTACHMENT does not operate as a summons; and service of it personally, without service on property, and service of an

inventory as required by statute, is insufficient to give jurisdiction over defendant under the Michigan statute: *Howell's Stats.*, sec. 6830, 6840. *Langtry v. Wayne Circuit Judge*, 352.

2. JURISDICTION CANNOT BE ACQUIRED BY THE MERE LEVY OF AN ATTACHMENT, sufficient to authorize the court to determine the question of indebtedness, and to condemn the attached property to pay the same. Though an attachment is levied, jurisdiction is not acquired until service of summons. *Great West Min. Co. v. Woodman etc. Min. Co.*, 204.
4. GARNISHMENT — EVIDENCE. — After service of summons to show cause, a garnishee defendant may make further and supplemental disclosure, and give in evidence matters of hearsay touching his liability to the principal defendant. *Drake v. Lake Shore etc. R'y Co.*, 382.
5. GARNISHMENT IN ONE STATE OF DEBT EXEMPT IN ANOTHER. — Garnishment proceedings cannot be instituted in one state to evade the exemption laws of a sister state, and thus deprive a laborer of the benefit of the laws of the latter state to protect his wages from seizure, when he resides in that state, has not been personally in the state where suit is instituted, nor has any property in that jurisdiction. *Id.*
6. GARNISHMENT IN ONE STATE OF DEBTS EXEMPT IN ANOTHER. — A creditor who is a citizen of one state cannot, by assigning his claim to a citizen of another state, use the courts of that state to collect a debt against a citizen of the former state whose person or property is not within the jurisdiction where suit is brought, and whose wages, sought to be reached and confiscated by garnishment, are exempt from seizure by the law of his state. *Id.*
7. GARNISHMENT IN ONE STATE OF DEBT EXEMPT IN ANOTHER. — The wages of an employee, exempt from attachment by the law of the state of his residence, where his contract for services is made and performed, and where his wages are payable, and the debt contracted, are not subject to garnishment in another state, where he has not subjected himself to the jurisdiction of the court save by the disclosure of the garnishee. *Id.*

See CHATTEL MORTGAGES; CONFLICT OF LAWS, 1; CORPORATIONS, 11; MALICIOUS PROSECUTION, 7-14; REPLEVIN, 2.

ATTORNEY AND CLIENT.

1. VALIDITY OF CONTRACT FOR SERVICES OF ATTORNEY. — Attorneys at law may be employed to defend persons charged with crime, where the alleged offenses are charged to have been committed prior to the employment, and their services may also be engaged for future transactions, where no wrong is intended or contemplated. But a contract entered into by attorneys at law to defend persons for criminal offenses, which were in contemplation of all the parties to be committed in the future, is against public policy, and void, and compensation for services actually performed under such contract cannot be recovered. *Bowman v. Phillips*, 292.
2. CONTRACT BY ATTORNEYS TO DEFEND FUTURE VIOLATIONS OF PROHIBITORY LIQUOR LAW IS VOID. — The plaintiffs, attorneys at law, entered into a contract with the defendants, who were engaged in the illegal sale of intoxicating liquors, whereby the plaintiffs agreed, for one year, for the monthly compensation of eighty dollars, payable on the first day of each month, to defend all cases brought against the defendants for violations of the prohibitory liquor laws. Services were actually performed by the plaintiffs under this contract, but they were paid for the

first nine months only, and this action was brought to recover for their services for the last three months of the year. It was held that the contract was in contravention of public policy, and void, and that the plaintiffs could not recover an additional amount for their services which they actually performed under the contract, although such services may have been worth more than the amount claimed for the entire year's work. *Id.*

2. **CHAMPERTY CONTRACT.** — An agreement by an attorney at law to prosecute a suit in which he had no previous interest, and to receive as compensation a stipulated sum in excess of the value of his services if successful, and nothing if the case was lost, is contrary to public justice and professional duty, and is void for champerty and maintenance. And the contract being illegal, the law does not imply a promise to pay the attorney what his services were worth, and the client may maintain an action against him for all he received, less any costs properly paid by him. *Butler v. Legro*, 573.
4. **APPEARANCE BY UNAUTHORIZED ATTORNEY BINDS NO ONE;** and the presumption that the attorney who appeared was authorized to do so may be rebutted in any direct proceeding to attack the judgment based upon such appearance, by showing that no process was served in the action, and that the attorney appeared without the consent or knowledge of the one whom he assumed to represent. *Great West Min. Co. v. Woodmas etc. Min. Co.*, 204.
5. **APPEARANCE OF ATTORNEY, IF UNAUTHORIZED, IS GROUND FOR VACATING JUDGMENT.** — Where the court acquires jurisdiction of an action solely by the appearance of an attorney, the party for whom the appearance was made may deny the authority of such attorney, and if the appearance was unauthorized, vacate the judgment. But the want of authority must be clearly made to appear, in order to warrant the court in vacating the judgment. *Winters v. Means*, 489.
6. **ATTORNEY BY VIRTUE OF HIS EMPLOYMENT HAS NO AUTHORITY TO COMPROMISE** an action which he is employed to prosecute or defend; but if such attorney assumes the right to exercise the power to compromise the action, and does exercise such power, it is not to be presumed that he acted in the matter without lawful authority, and slight evidence only may be sufficient to authorize the belief that he was clothed with all the power that he assumed to exercise. *East Line etc. R. R. Co. v. Scott*, 758.

BANKS AND BANKING.

1. **BANK UNDERTAKING TO COLLECT A CERTIFICATE OF DEPOSIT** is bound to use all reasonable diligence to protect the interest thus confided to its care. *German National Bank v. Burns*, 247.
 2. **A BANK IS NEGLIGENT WHEN IT SENDS A CERTIFICATE OF DEPOSIT BY MAIL FOR PAYMENT TO THE BANK WHOSE DUTY IT IS TO MAKE SUCH PAYMENT,** and it is therefore answerable for any damages resulting to its employer from such neglect. *Id.*
 3. **BANK WHICH DOES NOT EMPLOY A SUITABLE AGENT TO MAKE A COLLECTION** is answerable for his misconduct or negligence when such agent is the party or bank whose duty it is to make the payment. *Id.*
 4. **A BANK BECOMES UNCONDITIONALLY LIABLE FOR THE AMOUNT OF THE CERTIFICATE OF DEPOSIT GIVEN TO IT FOR COLLECTION** if it forwards such certificate to the bank by which it was issued, with the request to be
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credited with the amount thereof, if the certificate is received by the latter bank before it has suspended. *Id.*

BETTERMENTS.

IMPROVEMENTS — INTEREST. — Party in possession who is allowed the value of his improvements should not be allowed interest thereon from the time of filing the decree. *Boykin v. Ancrum*, 698.

See HUSBAND AND WIFE, 7.

BONDS.

OFFICE AND OFFICERS. — SURETIES IN OFFICIAL BOND OF BANK TREASURER ARE ESTOPPED by the recital therein of the fact that he "is treasurer" to deny that he was treasurer when the bond was given; and if the principal was then holding the office at the sufferance of the corporation, and not for a fixed term, and the bond purported to be given for an indefinite term, the only implied limitation of it is to the indefinite term which the sureties admitted he was holding. In such case, the liability of the sureties was not impliedly limited by the expiration and extension of the bank's charter. *Hall v. Brackett*, 598.

See SURETSHIP, 2.

BOOM COMPANIES.

See WATERCOURSES.

BOUNDARIES.

DECLARATIONS OF FORMER OWNER AND ADJOINING PROPRIETOR. — In an action involving a disputed boundary, consisting of a river, declarations by a former owner, under whom plaintiff claims, made forty years before the suit, and also declarations made by an adjoining proprietor, that the river has changed its bed, are inadmissible. *Taylor v. Glenn*, 724.

CARRIERS.

1. **CARRIERS OF PASSENGERS MUST USE THE UTMOST CARE AND DILIGENCE IN PROVIDING** safe, suitable, and sufficient vehicles for the conveyance of their passengers. *Treadwell v. Whittier*, 175.
2. **CARRIER OF PASSENGER IS BOUND TO THE UTMOST CARE AND DILIGENCE OF CAUTIOUS PERSONS**, and is responsible for any, though the smallest, neglect. His undertaking is to carry his passengers with safety, as far as human power and foresight can do so. *Id.*
3. **ELEVATORS. — THE CARE AND DILIGENCE EXPECTED OF PERSONS USING AN ELEVATOR IN THEIR PLACE OF BUSINESS** is the same as that resting on carriers of passengers by a coach or railway; and the latter are liable for the slightest neglect in regard to the vehicles provided for them, and are held to extraordinary diligence and care in their management. *Id.*
4. **OWNERS OF ELEVATORS MUST KEEP PACE WITH SCIENCE, ART, AND MODERN IMPROVEMENT** in supplying safe vehicles, machinery, and appliances for their use. *Id.*
5. **ELEVATORS. — A PERSON RUNNING AN ELEVATOR IN HIS PLACE OF BUSINESS** must be held to undertake to carry safely persons riding therein as fully as human care and foresight can do. *Id.*

6. CARRIER OF PASSENGERS IS RESPONSIBLE FOR DEFECTS WHICH MIGHT HAVE BEEN DISCOVERED by the most careful and thorough examination. *Id.*
7. ELEVATORS, MANUFACTURER'S WANT OF CARE AND SKILL. — OWNER OF ELEVATOR IS NOT EXCLUDED FROM THE DEGREE OF CARE AND DILIGENCE otherwise exacted of him by the fact that the elevator in use was constructed by a competent and skillful manufacturer, from whom it was purchased. Such manufacturer is a mere agent and servant in the construction of the elevator, for whose want of care the owner of the elevator becomes responsible. The obligation of care and foresight rests on the person using the elevator, and he cannot shift it from himself to another person. *Id.*
8. ELEVATOR, TESTING. — IF AN ACCIDENT IS CAUSED BY A DEFECT OR FAULT in one of the piston-rods of an elevator, the owner thereof is answerable to the person injured thereby, unless such defect or fault could not have been discovered on a reasonable and careful examination according to the best known tests reasonably practicable. *Id.*
9. PASSENGER-ELEVATORS. — A PERSON INJURED BY THE BREAKING OF THE machinery of a passenger-elevator has a right to recover against the persons by whom it was controlled, in the absence of evidence on the part of the defendant showing that he was free from fault or neglect. *Id.*
10. INSTRUCTIONS. — In an action to recover for injuries sustained in an elevator accident, the following instruction is not erroneous: "That the defendants owed it as a duty to the persons using the elevator in their store, either as customers or by their invitation or request, to use all reasonable means and efforts to furnish good and well-constructed machinery, adapted to the purposes of its use, of good material, and of the kind which is found to be safest when applied to use; and while they were not required to seek and apply every new invention, they must adopt such as are found by experience to combine the greatest safety with practical use." *Id.*
11. STREET-RAILWAY COMPANY IS NOT LIABLE as an insurer of the safety of its passengers, and is only answerable for any injury which may happen through its own negligence, or the negligence or default of its servants. *Wormsdorf v. Detroit City R'y Co.*, 453.
12. STREET-RAILWAY COMPANY IS BOUND TO PROVIDE SUITABLE CARS, with proper and safe appliances for checking their speed on a descending grade, and for stopping them as necessity or convenience may require, and to keep the same in good repair; to provide safe horses for the transportation of passengers, and careful and prudent drivers. *Id.*
13. STREET-RAILWAY COMPANY IS NOT REQUIRED to furnish its road with new cars, nor is it liable for using old ones, but whether new or old cars are used, it is required to keep them in good repair, and fit for use, so as not to endanger the safety of passengers. *Id.*
14. NONSUIT SHOULD BE REFUSED IN AN ACTION AGAINST A CARRIER for damages for refusing to carry goods for plaintiff, where there is evidence that plaintiff was refused transportation for his goods while the goods of others were carried without objection. *Avinger v. South Carolina R'y Co.*, 716.
15. RIGHT TO DISCRIMINATE. — In the absence of charter or statutory provisions to the contrary, a common carrier must carry for all who apply, but he may discriminate as to rates so long as no unreasonable charge is made. *Id.*

16. **BRANCH LINE.** — While a company, organized and chartered for the transportation of goods, merchandise, and other property, is a common carrier, still, when it constructs a branch line, whether it becomes a common carrier as to such line depends upon the character of use to which it is put, and is a question of fact for the jury. *Id.*
17. **COMMON CARRIER HAS NO RIGHT TO DEMAND OF SHIPPER WAIVER OF HIS RIGHTS** as a condition precedent to receiving freight. *Missouri P. R. R. Co. v. Fagan*, 776.
18. **CUSTOM REQUIRING OWNER TO GO ON SAME TRAIN WITH HIS STOCK**, to feed and water it, cannot be sustained, because the law imposes this duty on the carrier, and the latter cannot transfer it to the shipper by custom. *Id.*
19. **CUSTOM CANNOT EXTINGUISH LIABILITY IMPOSED BY LAW UPON COMMON CARRIERS** for a failure to perform their duties and obligations, nor can it require the injured party to limit such liability by agreement. *Id.*
See DAMAGES, 6, 7.

CERTIORARI.

See JUSTICES OF THE PEACE.

CHAMPERTY.

See ATTORNEY AND CLIENT, 3.

CHANCERY PRACTICE.

See EQUITY.

CHATTEL MORTGAGES.

1. **CHATTEL MORTGAGE EXECUTED BY PARTY UNDER FICTITIOUS NAME.** — Where a person executes a chattel mortgage under a fictitious name and delivers it to the mortgagee, who, without knowing that the name of the mortgagor was fictitious, records the mortgage in the proper county, the title to the property mortgaged vests in the mortgagee by the delivery of the mortgage, and he may recover the property from another person to whom the mortgagee sells it, under his true name, after the mortgage was recorded. *Alexander v. Graves*, 501.
2. **CHATTEL MORTGAGE — REMOVAL OF CHATTELS — CONSTRUCTIVE NOTICE.** — A chattel mortgage which is filed in the county clerk's office of the county in which the mortgagor is residing at the time of its execution is constructive notice of the existence of such mortgage in that county, and in any county to which the mortgagor may remove the mortgaged property. *Grand Island Bkg. Co. v. Frey*, 478.
3. **LIEN OF VALID CHATTEL MORTGAGE ON MACHINERY CANNOT BE DIVERTED** by attaching such machinery as a fixture in a roller mill. *Id.*

COMMON LAW.

See STATUTES, 7.

COMMUNITY PROPERTY.

See CRIMINAL LAW, 23, 24; HUSBAND AND WIFE, 1-5.

CONDITIONS.

See COVENANTS, 3, 4.

CONFLICT OF LAWS.

1. **ASSIGNMENT FOR THE BENEFIT OF CREDITORS** by a citizen of New York, made in that state, and giving a preference to certain creditors, though valid there, is void in South Carolina, where the statute prohibits the giving of such preference, and will not be enforced in the latter state in favor of citizens of New York as against property of the assignor situated in South Carolina, but such citizens may, by attachment, secure a lien against such property. *Ex parte Dickinson*, 749.
 2. **TRANSFER OR ASSIGNMENT** of personal property located in South Carolina, made by the owner in accordance with the law of his domicile in another state, will not be recognized in South Carolina when in direct conflict with the laws of that state. *Id.*
 3. **IF AN INJURY IS SUFFERED IN ONE STATE, AND AN ACTION IS BROUGHT IN ANOTHER** for damages resulting therefrom, the law of the former state, whether statutory or otherwise, determines the plaintiff's right to recover. If an action could not have been sustained in the state where the injury was suffered, none is maintainable elsewhere. *Bridge v. Asheville etc. R. R. Co.*, 653.
 4. **PUNISHMENT BY STATE OF ACTS WHICH ARE ALSO CRIMES AGAINST THE UNITED STATES.** — That which is made criminal by the laws of the United States may also be declared a crime against this state and its citizens, and may be punished as an infraction of the laws of this state. Hence, one guilty of having in his possession a block or plate from which may be printed a note of a foreign bank, may be indicted and punished in this state, though his offense is also punishable under the laws of the United States. He has in truth been guilty of two crimes, one against the state and another against the United States, and each may prosecute and punish the crime against it. *People v. McDonnell*, 159.
- See ATTACHMENT AND GARNISHMENT, 5-7; ESTATES OF DECEDENTS, 2.

CONSPIRACY.

See CRIMINAL LAW, 13.

CONSTITUTIONAL LAW.

1. **DELEGATION OF LEGISLATIVE POWER.** — A STATUTE PROVIDING THAT CERTAIN PERSONS SHALL SELECT A SITE for a public building proposed to be constructed is not an unlawful delegation of public powers. The mere act of selecting such site is not legislative. *People v. Dunn*, 118.
2. **CONSTITUTIONAL LAW.** — **ACT APPROPRIATING MONIES FOR THE PURCHASE OF LAND** to be used as a home for feeble-minded children, and for the erection of buildings thereon, and for the construction of fences and other improvements, does not violate a provision of the constitution inhibiting the passage of any law, other than a general appropriation bill, containing more than one item of appropriation for more than one single purpose. *Id.*
3. **THE LEGISLATURE CANNOT DEPRIVE THE SUPREME COURT** of its revisory jurisdiction over all the other state tribunals. *Brown v. Buck*, 438.
4. **REMEDIES.** — The legislature may change the formalities of legal procedure, but it cannot make changes so as to impair the enforcement of rights. *Id.*
5. **JUDGES, STATUTE LIMITING POWERS OF.** — Any statutory change which transfers the power which belongs to a judge to a jury, or to any other person or body, is unconstitutional. *Id.*

6. **JURY TRIAL IN EQUITY CASES.** — The Michigan statute of 1887, providing for a final decision of questions of fact in equity proceedings by the verdict of a jury, and for the rejection of testimony by the judge, as in suits at law, is unconstitutional. *Id.*
- See **CRIMINAL LAW**, 1, 11; **EQUITY**, 5; **JURY AND JURORS**, 1, 2; **OFFICE AND OFFICERS**, 1; **RAILROAD COMPANIES**, 16.

CONTRACTS.

1. **IN CONSTRUING CONTRACTS, WORDS ARE TO BE UNDERSTOOD** in their ordinary and popular sense, except in those cases in which the words used have acquired by usage a peculiar sense different from the ordinary and popular one. *Moore v. Phoenix Ins. Co.*, 556.
2. **CONTEMPORANEOUS WRITINGS — CONSTRUCTION.** — Where two writings are executed and delivered at the same time, and relate to the same subject-matter, they must be construed together in determining the contract between the parties. *McNamara v. Garrett*, 355.
3. **CONTEMPORANEOUS INSTRUMENTS** made at the same time, and having relation to the same subject-matter, must be taken to be parts of one transaction, and construed together, to show the true contract between the parties. *Sutton v. Beckwith*, 344.
4. **CONSIDERATION SUFFICIENT TO SUPPORT CONTRACT FOR FUTURE EMPLOYMENT.** — The compromise of a pending action whereby the plaintiff agrees to accept a money judgment in his favor for a less sum than the damages claimed by him in his petition, and a promise by the defendant to give him future employment in full satisfaction of his claim, constitute a sufficient consideration to support the contract for future employment. The absence of a promise by the plaintiff to serve in the future employment is a matter of no importance, except as it may bear on the question whether the contract was sufficiently certain. *East Line etc. R. R. Co. v. Scott*, 758.
5. **CONTRACT TO MINE — BREACH OF — REFUSAL TO DELIVER POSSESSION AFTER NOTICE.** — A party in possession of the mine of another under a contract under seal to take a certain quantity of rock each year "until the mines are exhausted," cannot retain possession after notice to quit, claiming under his contract, refusing to deliver possession, and continuing to take out rock. Such contract is for personal services only, and his only remedy is an action for damages for breach of the contract. *Wando Phosphate Co. v. Gibbon*, 690.
6. **UNCERTAINTY IN CONTRACT OF SALE IN REAL ESTATE WILL NOT AVOID IT WHEN SUCH UNCERTAINTY CONSISTS** in the fact that it purports to be "subject to the conditions in a formal contract as to clearing streets, improvements, etc.," and the contract so referred to is one to be entered into in the future. Nor is it any objection to such contract that it provides that it shall be surrendered "on delivery of a formal contract or deed." *Karns v. Olney*, 101.
7. **SUNDAY — INVALIDITY OF SUNDAY CONTRACT.** — A statutory claim bond delivered to and accepted by the sheriff on Sunday is absolutely void under section 1749 of the Alabama code, which declares void all contracts made on Sunday; and when the plaintiffs in the action bring suit on the bond, a plea averring its invalidity because of its acceptance on Sunday need not aver also the complicity of the plaintiffs in such acceptance. *Anderson v. Bellenger*, 46.

8. **WHEN CONTRACT IS NOT AN UNREASONABLE RESTRAINT OF TRADE.** — A contract entered into between two competing business firms, supported by a valuable consideration, whereby one sells its stock to its rival, and agrees to desist from further competition, is not void as being an unreasonable restriction on trade, when properly construed in connection with the attendant circumstances showing the limits of the territory covered by their previous competition. *Moore etc. Hardware Co. v. Towers Hardware Co.*, 23.
 9. **CONTRACT FOR FUTURE DELIVERY OF STOCKS, PRODUCE, OR OTHER MERCHANDISE** in which an actual delivery is not contemplated, but only a payment of the difference between the contract price and the value of the article at the time agreed upon as the date of delivery, is a mere wagering contract, which will not support an action. But if the transaction has been completed, and another collateral thereto grows out of it, founded upon a new consideration, the new contract is not vitiated by the taint of the old one, and may be enforced. *Floyd v. Patterson*, 787.
 10. **CONSIDERATION — GAMBLING CONTRACT VOID AS AGAINST PUBLIC POLICY.** — The taking of bonds, notes, or other evidences of indebtedness in whole or part consideration of bonds, contracts, or other agreements, for the sale of grain, seeds, or other cereals at a fictitious price, are gambling contracts, and void as against public policy between the original parties and purchasers with notice. *McNamara v. Gargett*, 355.
 11. **VALIDITY — PUBLIC POLICY.** — Contracts which are at war with the established interests of society, and in conflict with the morals of the time, are void as against public policy, and the fact that individuals may suffer can in no manner affect the question, as their interests must be subservient to the public welfare. *Id.*
 12. **VALIDITY — PUBLIC POLICY.** — If any part of the consideration of a contract is illegal, the whole contract is void as against public policy, although the illegal act or promise is coupled with one which is legal. *Id.*
 13. **AS BETWEEN ORIGINAL PARTIES AND ALL PARTIES IN PARI DELICTO**, the courts will not enforce illegal contracts, nor any supposed rights founded thereon, but will leave the parties and those in *pari delicto* where they find them, and will leave each in possession of what he has already obtained. *Bowman v. Phillips*, 292.
- See AGENCY, 3; ATTORNEY AND CLIENT, 1-3; EVIDENCE, 9, 11; MASTER AND SERVANT, 4, 5; NEGOTIABLE INSTRUMENTS, 6; RAILROAD COMPANIES, 23.

CORPORATIONS.

1. **CORPORATION IS LEGAL ENTITY, SEPARATE AND DISTINCT** from the individuals who, from time to time, may be its stockholders, and is not affected by the personal rights, obligations, or transactions of its individual stockholders with third persons, whether such rights accrued or obligations were incurred before or after incorporation. *Moore etc. Hardware Co. v. Towers Hardware Co.*, 23.
2. **DIRECTORS OF CORPORATION, AS SUCH, CAN ACT IN BEHALF** of the corporation only as a board. Their power is not joint and several, but joint only. *Buttrick v. Nashua etc. R. R. Co.*, 578.
3. **DIRECTOR OF RAILROAD CORPORATION, THOUGH NOT TECHNICALLY A TRUSTEE**, stands in a fiduciary relation to the corporation, and is under the disability of a trustee. *Pearson v. Concord R. R. Corporation*, 590.

4. STOCKHOLDER IN CORPORATION SUSTAINS TO DIRECTORS the relation of a *cestui que trust*, and a court of equity will interfere, at the suit of a stockholder, to enjoin the action of common directors of two railroad corporations in respect to matters where the interests of the roads are in conflict. *Id.*
5. DIRECTORS ACTING FOR TWO CORPORATIONS WHERE INTERESTS ARE CONFLICTING. — The managers of a railroad corporation, acting for it and in its interests, bought a controlling interest in the stock of a connecting road for the purpose of making with themselves, as controlling managers of the latter road, contracts more favorable to the former, and they accomplished that purpose. In a suit brought by a stockholder to restrain the execution of the contracts, the inquiry whether they are fair and just is wholly immaterial. And the court may appoint a trustee in such case to manage those affairs of the disabled company which the trustees (directors) are legally incapacitated to perform. *Id.*
6. RAILROAD CORPORATION CANNOT BECOME STOCKHOLDER IN ANOTHER RAILROAD CORPORATION for the purpose of controlling the business or affecting the management of the latter, unless such power is given by statute, or is necessarily implied in its charter. *Id.*
7. PROOF OF CORPORATE EXISTENCE. — When, to an action by a corporation, the plea of *non tiel* corporation in proper form is interposed, the burden is on the plaintiff to prove its corporate existence, either by producing its charter or articles of incorporation, or by some admission on the part of the defendant, or by showing a state of facts which will operate as an estoppel. *Schloss v. Montgomery Trade Co.*, 51.
8. ESTOPPEL TO DENY CORPORATE EXISTENCE. — In action by corporation suing as such against a subscriber to its capital stock before incorporation, the payment by the defendant of former installments as called for, and an averment that the installment sued for had been "duly and regularly called in by the plaintiff, and demand therefor made upon the defendant," do not, standing alone, show an estoppel against him to deny the existence of any corporation. *Id.*
9. ALABAMA STATUTE, CODE OF 1886, SECTION 1663, HAS CHANGED the rule of the common law, so as to authorize the organization of a business corporation before all of the capital stock has been subscribed for. *Id.*
10. TO BIND A CORPORATION, THE SERVICE OF PROCESS must be upon the identical agent provided by a statute. *Great West Min. Co. v. Woodmas etc. Min. Co.*, 204.
11. ATTACHMENT OF CORPORATE STOCK. — A transfer of stock in a dividend-paying corporation, not recorded by the proper officer in the record-book kept for the purposes, is ineffectual to pass the property as against attaching creditors without notice. And where the corporation itself attaches the stock, it is not chargeable with knowledge of such transfer possessed by one of its directors who took no part in causing the attachment to be made, and who had no knowledge of it. *Bastwick v. Nashua etc. R. R.*, 578.
12. INJUNCTION WILL NOT LIE TO RESTRAIN PRIVATE CORPORATION FROM VIOLATION OF CONTRACT entered into, prior to incorporation, by its principal corporators and stockholders upon their individual credit, when it is not alleged nor shown that the corporation was organized fraudulently for the purpose of evading obligations which the contractors had taken upon themselves as individuals. *Moore etc. Hdw. Co. v. Fessers Hdw. Co.*, 22.

12. **CORPORATION WILL BE CHARGED WITH ENGAGEMENTS ENTERED INTO BETWEEN ITS PROMOTERS** in anticipation of incorporation and third persons, the benefits of which it has received and accepted, even in the absence of an express promise to perform or ratification on the part of the corporation after it is *in esse*. And where associates combine together to create a "paper corporation," thereby to free themselves from individual obligations, a court of equity will hold the nominal corporation to a discharge of such obligations. *Id.*
14. **LIABILITY OF CORPORATION FOR TORT COMMITTED AFTER EXPIRATION OF ITS CHARTER.** — A private business corporation duly organized and incorporated under the laws of West Virginia, which continues its corporate business in its corporate name after the time fixed by its charter for its duration has expired, can be sued and made liable as a corporation *de facto* for a tort committed by it after its charter has expired. And its directors and stockholders, by failing to wind up its business when the charter expires, cannot relieve it from liability for acts done in its name during its actual existence as such *de facto* corporation. *Miller v. Coal Company*, 903.
15. **Plea that CORPORATION DEFENDANT HAS CEASED TO EXIST IN LAW** is insufficient. To be sufficient, it must further aver that it had ceased to exist in fact at the time when the alleged cause of action arose. *Id.*
16. **RESTRICTIONS BY STATE ON RIGHT OF FOREIGN CORPORATIONS TO TRANSACT BUSINESS WITHIN SUCH STATE.** — Under Alabama constitution of 1875, article 14, section 4, no foreign corporation has authority to transact business in that state without having at least one known place of business, and an authorized agent or agents therein. And a subsequent statute declares that "it shall not be lawful" for any person to act as agent, or transact any business for or on behalf of any such corporation, until such constitutional requirement is complied with: *Sess. Acts 1886-87*, pp. 102-104. Without compliance with the conditions thus imposed, a foreign corporation engaged in the business of loaning money on mortgages, and it was held that an agent of the corporation could not maintain an action to recover compensation agreed to be paid him for procuring a loan from the corporation. *Dudley v. Collier*, 55.
17. **VENUE IN SUITS AGAINST CORPORATIONS.** — Under the Texas statute, suit may be brought against foreign private or public corporations doing business in the state, in any county where such corporations have an agency or representation, without showing that their principal office is in that county. *Bradstreet Co. v. Gill*, 768.

See AGENCY, 9; BANKS AND BANKING; PROCESS, 2, 3.

CO-TENANCY.

1. **TENANTS IN COMMON** are not entitled to partition while holding the common property under an unexpired lease from their ancestor. *Cannon v. Lomax*, 739.
2. **TENANT IN COMMON IS ENTITLED TO PARTITION WITHOUT ENTRY**, actual possession, or judgment in a writ of entry, against a co-tenant in actual and exclusive possession. *Barker v. Jones*, 586.
3. **TAX TITLES BOUGHT BY ONE TENANT IN COMMON OF LAND CANNOT BE SET UP** by him against his co-tenant, except for the purpose of enforcing equitable contribution. *Id.*

4. ONE TENANT IN COMMON MAY MAINTAIN AN ACTION AGAINST A TRESPASSER for the whole property. *Newman v. Bank of California*, 169.
5. A TENANT IN COMMON WHO SUES A TRESPASSER, AND THEREBY RECOVERS POSSESSION OF THE PROPERTY, must thereafter be regarded as in possession from the time he brought his action, and the defendant must therefore be regarded as out of possession from the same time. *Id.*
6. JUDGMENT FOR ONE CO-TENANT, WHEN INURES TO THE BENEFIT OF ANOTHER. — Recovery of judgment for possession by one tenant in common against a trespasser, and its subsequent enforcement, inure to the benefit of the other co-tenants. Hence, the possession of such trespasser, after the commencement of such suit, cannot give him a prescriptive title as against another tenant in common who did not sue. *Id.*

See PARTITION.

COUNTERFEITING.

See ARREST, 2; CRIMINAL LAW, 14-16; CONFLICT OF LAWS, 4.

COVENANTS.

1. A COVENANT DOES NOT RUN WITH LAND UNLESS contained in a grant thereof, or of some estate therein. *Fresno Canal Co. v. Rowell*, 112.
2. CONTRACT BY LAND-HOLDER, WHEN BINDS HIS GRANTOR. — If the owner of land agrees to take water for a definite period for the purpose of irrigating such land, and to pay therefor a specified price annually, and the agreement declares that it shall run with and bind the land, a subsequent grantee of the land, with notice of the agreement, is not personally bound by it, but it creates a lien on such land which may be enforced against it in the hands of any subsequent purchaser with notice thereof. *Id.*
3. CONDITION SUBSEQUENT INSERTED FOR A MERE TRICIOUS PURPOSE. — A grantor in conveying land by deed has a right to insert, for an honest and beneficial purpose, a condition that the grantor, his heirs or assigns, shall not sell nor give away any intoxicating liquor upon the premises, and providing that upon violation of such condition, the land shall revert to the grantor, who shall at once take possession; but such condition will not be enforced when inserted for a dishonest purpose, and to enable the grantor to obtain a monopoly of the prohibited business. *Chippewa Lumber Co. v. Tremper*, 420.
4. EJECTMENT — CONDITION AGAINST SALE OF INTOXICATING LIQUOR — EVIDENCE — WAIVER. — In ejectment by a grantor to enforce a condition in a deed that the grantee should sell no intoxicating liquors on the premises, and upon a breach of the condition the land should revert to the grantor, the grantee may prove that the grantor's agent, with his knowledge, is engaged in the unlawful sale of liquor in the same village with the grantee, and from such proof the jury may infer that the grantor acquiesced in and consented to such sale, desiring to secure a monopoly in that business. This would be a perfect defense in ejectment, and the grantee would be justified in considering this a waiver of the condition in his deed, which waiver he might act upon until notified to the contrary, and until then no forfeiture could be claimed for breach of condition in the deed. *Id.*

CRIMINAL CONVERSATION.

1. GIFT OF ACTION FOR CRIMINAL CONVERSATION is the loss of the comfort and society of the wife. The husband must prove that some right of

- his own in the person or conduct of his wife has been violated. *Cross v. Grant*, 607.
2. NEW HAMPSHIRE GENERAL LAWS, CHAPTER 183, REGULATING PROPERTY RIGHTS OF MARRIED WOMEN, has not repealed the common law giving to the husband an action for criminal conversation for the adultery of his wife. *Id.*
 3. MISCONDUCT, NEGLECT, OR INFIDELITY OF HUSBAND CANNOT BE SET UP as a defense for the infidelity of the wife in an action for criminal conversation. But evidence of the husband's ill-treatment of his wife is admissible in mitigation of damages. *Id.*
 4. EVIDENCE — IN ACTION FOR CRIMINAL CONVERSATION, LETTER WRITTEN BY DEFENDANT IS ADMISSIBLE, where, unexplained, it tended to show that the defendant resorted to indirect means to procure the attendance of the plaintiff's wife at the town where he resided. *Id.*

CRIMINAL LAW.

1. THE SAME WRONG MAY CONSTITUTE AN OFFENSE both against the state and a municipal corporation, and both may punish it without violating any constitutional principle; and this, though prosecutions in the state and municipal court are taking place at the same time. *City Council v. O'Donnell*, 728.
2. JOINDER OF OFFENSES IN INDICTMENT, WHEN GROUND FOR QUASHING, AND WHEN NOT. — If an indictment contains different counts which are in fact for separate and distinct offenses, and this fact appears on the opening of the cause, or at any time before the jury are sworn for the trial thereof, the court may quash the same, lest it may confound the prisoner in his defense, or prejudice his challenges of the jury; and in such case, if the defect is discovered after the jury is sworn, and before the verdict is found, the court may require the prosecutor to elect on which charge he will proceed. But if the charges in the different counts of the indictment are of the same general character, and are manifestly inserted in good faith for the purpose of meeting the various aspects in which the evidence may present itself upon the trial, the court will neither quash the indictment nor compel the prosecutor to elect upon which count he will proceed to trial. *State v. Shores*, 875.
3. INDICTMENT IN TWO COUNTS, ONE FOR BREAKING INTO DWELLING-HOUSE of a person, and the other for breaking into his storehouse, is good, where it is evident, from the face of the indictment, that the two counts were made to meet the proof that the dwelling-house and storehouse were in the same building. *Id.*
4. RECORD SHOWING PRISONER WAS INDICTED "FOR FELONY" is a sufficient finding of the indictment, notwithstanding it contains two counts. *Id.*
5. INDICTMENT IS NOT VITIATED BY OMISSION TO WRITE AT FOOT OF IT NAMES OF WITNESSES on whose evidence it was found. The statute requiring the names of such witnesses to be written at the foot of the indictment is directory, not mandatory. *Id.*
6. FACT THAT INFORMATION CONTAINS SURPLUSAGE or redundant allegations will not warrant the court in quashing it, where there is specific matter alleged sufficient to clearly indicate the crime charged. *State v. Furney*, 262.
7. TO WARRANT CONVICTION WHERE STATE RELIES UPON a single chain of circumstantial evidence, each essential fact in the chain of circumstances must be found by the jury to be true beyond a reasonable doubt. *Id.*

8. EVIDENCE. — Where the question of the location of a defendant at a particular time materially affects his guilt or innocence, evidence as to that question is admissible. *State v. Byrd*, 660.
9. PRISONER IS NOT PREJUDICED BY EVIDENCE SHOWING THAT OTHERS INDICTED WITH HIM ARE IN JAIL. *State v. Shores*, 875.
10. SHERIFF OR DEPUTY NEED NOT BE SWORN EACH DAY he has the jury in charge in a felony case to keep the jury together, etc. *Id.*
11. ACT OF 1887 PERMITTING PROSECUTING ATTORNEY TO STRIKE OFF TWO JURORS from the panel of twenty, and the prisoner six, is constitutional. *Id.*
12. DRUNKENNESS IS NO EXCUSE FOR COMMITTING CRIME. *Id.*
13. CONSPIRACY. — COMMON DESIGN. — Where persons combine to commit a crime, and while engaged in such unlawful act murder is committed by one of such conspirators, without the knowledge or consent of the others, and the act is not the natural and probable outcome of the common design, but the independent act of one conspirator alone, and outside of the common purpose, those not participating in it are not guilty of murder. *State v. Furney*, 262.
14. NOTES OF THE BANK OF ENGLAND. — Having knowingly, willfully, unlawfully, and feloniously in one's possession a certain stamp, block, or plate designed and engraved for the purpose of striking and printing counterfeit bank notes in likeness of and similitude to the genuine notes of the Bank of England, is a crime, punishable under section 406 of the Penal Code of California. *People v. McDonnell*, 159.
15. INDICTMENT FOR HAVING IN POSSESSION A CERTAIN STAMP, BLOCK, OR PLATE FOR COUNTERFEITING NOTES OF THE BANK OF ENGLAND need not allege the incorporation of that bank. As a matter of identity the description is satisfied by proof that the company is known as a corporate company and is acting as such, and as such issues bills which come within the statute. *Id.*
16. GUILTY POSSESSION OF PLATE OR BLOCK TO BE USED IN COUNTERFEITING. — One who procures from an engraver a block or plate, with intent to employ the same in printing counterfeit bank notes therefrom, has such guilty possession thereof as will sustain his conviction, although the delivery of the same to him by such engraver was in pursuance of an understanding between the latter and certain policemen that such delivery was to be made, and that they were immediately to arrest the defendant with such block or plate in his possession and to take it away from him; and pursuant to such understanding, they at once made such arrest and took from defendant the possession of such block or plate. *Id.*
17. HOMICIDE — MURDER — EVIDENCE OF BAD CHARACTER OF DECEASED. — In cases of homicide, evidence of the general bad character of deceased is inadmissible, unless the plea of self-defense is interposed. In that event, evidence of his bad character for violence, treachery, vindictiveness, etc., is admissible, where it reasonably appears that the prisoner knew or may be supposed to have known such character or conduct. *State v. Turner*, 708.
18. MURDER — EVIDENCE OF BAD CHARACTER OF DECEASED. — Where the prisoner and deceased fought in the morning, the latter using an ax at the time, and afterwards following the prisoner to his storehouse, where the fatal affray took place, evidence of the reputation and general character of the deceased for violence is admissible, as bearing upon the act and motive of the prisoner. *Id.*

19. **MURDER — INSTRUCTIONS — QUESTION FOR JURY.** — The degree of homicide in any special case depends upon the motive which prompted the killing, and this is a matter entirely for the jury. The judge should define and explain these different degrees, and the jury must be governed by the definitions and explanations given; but whether any particular crime, as defined by the judge, has been committed, or whether the case is one of self-defense, as explained by the judge, is a question of fact, and is alone for the jury. *Id.*
 20. **MURDER — INSTRUCTIONS — QUESTION FOR JURY.** — Charge in a murder case that the facts stated by the accused, if believed by the jury, might reduce the offense to manslaughter, thereby excluding from its consideration all question of self-defense in connection with such facts, is error. *Id.*
 21. **EVIDENCE. — TO ENTITLE STATEMENTS OF DECEASED, NOT MADE UNDER OATH, TO BE ADMITTED IN EVIDENCE** as dying declarations, it must clearly be shown that such statements were made with a full knowledge and belief that death was imminent, and that the deceased with this knowledge, and without a hope or expectation of recovery, made the statements. *State v. Furney*, 262.
 22. **LARCENY. — INTENT TO STEAL IS NECESSARY TO CONSTITUTE LARCENY.** *State v. Shores*, 875.
 23. **COMMUNITY PROPERTY, LARCENY OF.** — One may be convicted of the larceny of community property, notwithstanding it was given into his possession by a wife, who consented to have it taken with the felonious intention of depriving her husband of it. *People v. Swalm*, 96.
 24. **LARCENY OF COMMUNITY PROPERTY, EVIDENCE SUFFICIENT TO SUSTAIN CONVICTION FOR.** — Defendant is properly convicted of larceny, where it appears that he had seduced a wife, and had been handed property by her to be taken away from the state; that he afterwards declared the property to be that of a third person; that he was going away under an assumed name; and that he tried to bribe the officer who arrested him while he was attempting to leave the state with such property in his possession. *Id.*
 25. **EVIDENCE. — IN A PROSECUTION FOR LARCENY OF THE PROPERTY OF A MARRIED MAN,** which had been given into the possession of the defendant by the former's wife, evidence of adulterous intercourse between the wife and defendant is properly received, because it tends to show that the taking was against the will of her husband, and with an intent to deprive the husband of the property. *Id.*
 26. **PERJURY. — In charging perjury under the South Carolina statute,** it is not necessary to allege that the false swearing was material to the issue. It is sufficient to aver that the oath was required by law, administered by one authorized to do so, and that it was willfully and knowingly false, and when its materiality is not alleged it need not be proved. *State v. Byrd*, 660.
 27. **INDICTMENT FOR PERJURY IS NOT DEFECTIVE** because it does not charge that the proceeding in which the crime was committed, before a trial justice, "was commenced on information under oath." *Id.*
- See **APPEAL AND ERROR**, 12; **ARREST; EXEMPTIONS**, 1; **LIBEL AND SLANDER**, 9-11; **PLEADING**, 13.

DAMAGES

1. **GENERAL AND SPECIAL, WHAT ARE.** — Damages which necessarily result from the act complained of are denominated general damages, and may

be proved under the *ad damnum* clause or general allegation of damages, while those which are the natural consequences of the act complained of, and not the necessary result of it, are termed special damages. *Treadwell v. Whittier*, 175.

2. DAMAGES NOT NECESSARILY RESULTING FROM THE ACT DONE MUST BE SPECIALLY PLEADED, or the plaintiff will not be permitted to give evidence of them at the trial. *Id.*
3. DAMAGES FOR PERMANENT LOSS AND INJURY, SPECIAL PLEADING OF. — The court may instruct the jury to take into consideration permanent loss and injury arising to plaintiff from the injuries set out in the complaint which render him less capable of attending to his business than he would have been if the injury had not been received, where the extent and nature of the plaintiff's injuries are alleged in the complaint, and they are such as must necessarily render him less able to attend to his business than before. The future effect of injuries is not special damages, which must be alleged, but general damages, which necessarily flow from injuries received. *Id.*
4. IN ACTION FOR ASSAULT AND BATTERY. — In an action of trespass for an assault and battery, damages cannot be recovered by way of punishment to the defendant, but for compensation to the plaintiff for the injury done to him; and in considering the amount of damages, the jury may consider, not only the physical injury and physical suffering, and the expenses and loss of time and wages, but also the mental anguish, shame, and dishonor suffered by the plaintiff. And an instruction in such case that "if the jury believe, from the evidence, that the assault in the declaration mentioned was committed by the defendant, the plaintiff is only entitled to compensation for such injuries as he may have shown, from the evidence, were caused by the said assault, they will not award punitive, vindictive, or exemplary damages," is properly refused, because it does not propound the law correctly, and is misleading. *Beck v. Thompson*, 870.
5. INJURIES TO PLAINTIFF'S SON — MEASURE OF DAMAGES. — In an action by a father against one by whose turn-table it is claimed the plaintiff's son was injured, the father cannot recover the value of his own services as a nurse to his son, and his earnings as agent of a publishing company. *Bridger v. Asheville etc. R. R. Co.*, 653.
6. IN AN ACTION AGAINST A COMMON CARRIER for refusing to carry goods, the rule of damages is, that if the carrier was honestly trying to enforce his rights without interfering with the rights of others, either maliciously or willfully, the jury must confine itself to actual damages, but when there has been any ill-will or willful disregard of the rights of another, then the jury may give exemplary damages. *Avinger v. South Carolina R'y Co.*, 716.
7. MEASURE OF DAMAGES FOR TOTAL LOSS OF STOCK SHIPPED. — The measure of damages for the total loss of mares with foal shipped by a railroad company is the price they would have brought in the market at the place of destination in the condition they would have been in had the company exercised due and necessary care of them while in its possession, less the freight. In case of partial loss, the measure of damages is the difference between such price, less the freight, and their value at such destination at the time of their arrival. *Missouri Pac. R. R. Co. v. Fagan*, 776.
8. NEGLIGENCE — DAMAGES IN ACTION FOR PERSONAL INJURIES CAUSED BY — VERDICT NOT EXCESSIVE. — The plaintiff, at the time of the injuries

complained of, was thirty-nine years of age, and for twelve years had been engaged in railroading, and intended it as his life business. As brakeman and car-cleaner he was earning eighty-five dollars per month, and was in good physical health. In such case, considering the injury he received, the amputation of his foot, the diseased condition of his leg at the time of the trial, and his inability to move around except upon crutches, a verdict for seven thousand dollars was not excessive. *Kansas City etc. R. R. Co. v. Kier*, 311.

9. VERDICT WILL NOT BE SET ASIDE FOR EXCESSIVENESS ALONE in a case where mental anguish or distress is an element of actual damage, for the estimation of which the law furnishes no rule, unless it appears that the jury have acted from passion, prejudice, or other improper influence. *Western Union Tel. Co. v. Broesche*, 843.

10. TITLE SUFFICIENT TO MAINTAIN ACTION FOR DAMAGES. — Plaintiff in possession under a paid-up contract entitling him to a deed has title sufficient to enable him to recover for the loss of hay and pasturage through the negligence of a log-booming company. *Witheral v. Muskegon B. Co.*, 325.

11. TITLE SUFFICIENT TO MAINTAIN ACTION FOR DAMAGES. — Where a contract for the purchase of land provides that the vendor is to have one half of the proceeds of the hay cut upon the premises until the purchase-money is paid, the title, property, and possession remain in the vendee, so as to maintain an action for the loss of such hay, as he only has to account to the vendor in money for one half the hay gathered, sold, or otherwise disposed of. *Id.*

See AGENCY, 11; EMINENT DOMAIN; INTEREST; LIBEL AND SLANDER, 13-17; NUMANCER, 3; TELEGRAPH COMPANIES, 3, 5.

DEBTOR AND CREDITOR.

See FRAUDULENT CONVEYANCES, 8, 9.

DEEDS.

1. ACKNOWLEDGMENT — CERTIFICATE OF ACKNOWLEDGMENT IS NOT ESSENTIAL TO VALIDITY OF DEED OF CONVEYANCE, but is simply evidence of the execution of the deed; and where the certificate is absent, the execution may be established by other proof. *Munger v. Baldridge*, 273.

2. TELEPHONE, ACKNOWLEDGMENT OF DEED BY. — The fact that a married woman is not personally present before a notary at the time he takes her acknowledgment through a telephone, she being three or four miles distant from him, will not vitiate such deed; because, in the absence of fraud, accident, or mistake, the certificate of the notary, in due form, is conclusive of the material facts therein stated. *Banning v. Banning*, 156.

See COVENANTS.

DEPOSITIONS.

See APPEAL AND ERROR, 3.

DEVISES.

See WILLS.

DOCUMENTARY EVIDENCE.

See EVIDENCE, 6-8.

DOMICILE.

CHANGE OF DOMICILE, WHAT CONSTITUTES. — Where a person entirely abandons his former domicile in one state, with no intention of returning thereto, but with the intention of making his home at a fixed place in another state, the latter state becomes his domicile, notwithstanding the fact that upon reaching his intended home he immediately goes with his family to visit a neighbor in the former state, where he sickens and dies without ever returning to live at his new home. *White v. Tennant*, 896.

See ESTATES OF DECEDENTS, 2.

DRUNKENNESS.

See CRIMINAL LAW, 12.

EJECTMENT.

See COVENANTS, 4.

ELEVATORS.

See CARRIERS, 3-10; NEGLIGENCE, 7, 8.

'EMINENT DOMAIN.

1. **DAMAGES RECOVERABLE FOR THE SEIZURE OF LANDS UNDER THE RIGHT OF EMINENT DOMAIN** INCLUDE all damages which are the natural, necessary, or reasonable incidents of the improvement, but not such as rise from negligence or unskillful construction or use thereof. *Denver City etc. Co. v. Middaugh*, 234.
2. **IN ASSESSING DAMAGES IN CONDEMNATION PROCEEDINGS** for lands taken for the purpose of constructing a canal, ditch, or reservoir thereon, injuries likely to result from seepage or leakage should be considered by the jury, and if not considered by the jury, cannot be recovered in a subsequent action or proceeding. *Id.*
3. **DAMAGES, WHAT INCLUDED IN JUDGMENT OF CONDEMNATION.** — Damages resulting from seepage and leakage from a ditch or reservoir, and not arising from the negligent or unskillful construction or use thereof, must be deemed as included in the judgment condemning lands for the construction of certain canals, lakes, and reservoirs. *Id.*
4. **EMINENT DOMAIN PROCEEDING, TESTIMONY AS TO DAMAGES IN.** — A witness called to testify to the amount of damages caused to a person's land by the construction of a public improvement near it cannot be permitted to state the amount of damages to which, in his opinion, the owner is entitled. The witness may testify to the value of the land before the construction of the improvement, and to the value thereof immediately afterwards, and the duty will then devolve upon the jury to determine, from the testimony, the amount of the damages. *City of Omaha v. Kramer*, 504.
5. **WORDS "OR DAMAGED," IN SECTION 21, ARTICLE 1, OF CONSTITUTION OF NEBRASKA**, include all actual damages resulting from the exercise of the right of eminent domain which diminish the market value of private property. *Id.*

See JURISDICTION, 1.

EQUITY.

1. **RIGHT TO HAVE EQUITY CASES** dealt with by equitable methods is as sacred as the right of trial by jury. *Brown v. Buck*, 438.
2. **SYSTEM OF CHANCERY JURISPRUDENCE** has been developed as carefully and judiciously as any part of the legal system, and the judicial power includes and always must include it. *Id.*
3. **WHATEVER MACHINERY BE USED** for gathering testimony or enforcing decrees, the facts and law must be decided together in equity cases; and when the chancellor desires the aid of a jury to find out how facts appear to such unprofessional men, it can be done only by submitting single issues of fact, and the jury cannot foreclose him in his conclusion unless his judgment is convinced. *Id.*
4. **FUNCTIONS OF JUDGES** in equity cases are as well settled a part of the judicial power, and as necessary to its administration, as the functions of juries in common-law cases. *Id.*
5. **CONSTITUTIONAL LAW.** — Cognizance of equitable questions belongs to the judiciary as part of the judicial power, and under the Michigan constitution must remain vested with them. *Id.*
6. **CHANCERY PRACTICE.** — When any matter becomes involved in a chancery suit, the necessities of justice and equity require that all persons and all things concerned in the controversy shall be brought before the court to have their respective interests charged or protected, and to end the controversy finally. *Id.*
7. **ADEQUATE REMEDY AT LAW — DEMURRER.** — A general demurrer to a bill in equity, on the ground that the bill discloses an adequate remedy at law, is properly overruled where the remedy at law is adequate to one only of the two aspects in which relief is prayed. *Tillman v. Thomas*, 42.
8. **PERSONAL DECREE AGAINST PLAINTIFF, ERRONEOUS WHEN.** — Where, in a suit to enjoin a void judgment, relief is denied the plaintiff because he has an adequate remedy at law, it is error to enter a personal decree against him. The only power the court has in such cases is to dismiss the bill, with costs. *Railway Co. v. Ryan*, 865.
9. **PARTIES TO BILL.** — **PERSONAL REPRESENTATIVE OF DECEASED HUSBAND IS NOT NECESSARY PARTY** to a bill filed by creditors seeking to subject the proceeds of a policy of insurance on his life, as against the claims of his children to the payment of their debts, although he might be a proper party. *Tompkins v. Levy*, 31.
10. **FRAUDULENT CONVEYANCE — WHEN BILL TO CANCEL AS CLOUD ON TITLE WILL NOT LIE.** — Purchaser of land at sheriff's sale, under execution against a debtor who has fraudulently conveyed the land to his vendee, has a plain and adequate remedy at law by action of ejectment, and cannot, while out of possession, maintain a bill in equity to cancel the fraudulent conveyance as a cloud on his title. *Teague v. Martin*, 63.
11. **JURISDICTION TO SET ASIDE SALE PROCURED BY FRAUD — WHEN SUBPURCHASER IS NOT ENTITLED TO PROTECTION.** — A sale of lands under a probate decree, procured to be made through fraudulent collusion between the administratrix of the deceased owner and the purchaser, in payment of her individual indebtedness to him, will be set aside in equity at the suit of the heirs, on averment and proof of such facts; and a subpurchaser from the original fraudulent purchaser, having a sufficient knowledge of the facts to put him on inquiry, is chargeable with

notice of the fraud, and is not entitled to protection as against the equity of the heirs. *Tillman v. Thomas*, 42.

See CONSTITUTIONAL LAW, 6; LACHES; MANDAMUS, 2; MARRIED WOMEN, 1; NUISANCES, 2; USAGES AND CUSTOMS.

ESTATES.

1. **MERGER IS THE ANNIHILATION** of one estate in another, and takes place usually when a greater estate and a less coincide and meet in one and the same person, without any intermediate estate, whereby the less is immediately merged; that is, sunk or drowned in the greater. *Boykin v. Ancona*, 698.
2. **MERGER OF EQUAL ESTATES.** — The general rule is, that equal estates will not merge in each other; but to this rule there are well-established exceptions. Even when the estates are theoretically equal, the first in the order of succession may merge in the next vested remainder. An estate at will may merge in an estate for years, and estates for years may merge into each other or in estates for life. Estates for life may merge into each other. *Id.*
3. **AN ESTATE FOR YEARS WILL MERGE IN A REVERSIONARY TERM OF YEARS**, even though the latter is of less duration. *Id.*
4. **WILLS—MERGER OF LIFE ESTATES—STATUTE OF LIMITATIONS AS AGAINST REMAINDERMEN.** — Where, under a devise to A for life, remainder to B for life, and remainder to B's issue in fee, B purchases A's estate, and dies, leaving the latter surviving, his estate is merged in that of B, and at the death of the latter, his issue are entitled to the estate in fee, but if B conveys the land, and dies, the statute of limitations will begin to run from that time in favor of his grantee and against his heirs, whose rights, after twenty years' acquiescence in the adverse possession of such grantee, are barred. *Id.*

ESTATES OF DECEDENTS.

1. **JUDGMENT ENTRY ON AN APPEAL** from the commissioners of claims against an estate should be an allowance or disallowance of the claim, which should be certified to the probate court. *Tyler v. Estate of Gallop*, 336.
2. **LAW OF DECEDENT'S DOMICILE GOVERNS DISTRIBUTION OF HIS PERSONAL ESTATE**, although he die in another state. *White v. Tennant*, 896.

See EQUITY, 9; HOMESTEAD, 2, 3.

ESTOPPEL.

1. **ONE WHO GIVES A FORTHCOMING BOND** in an action of claim and delivery is estopped from denying that the property was in his possession at the commencement of the action. *Benesch v. Wagner*, 254.
2. **ONE CONTRACTING IN A CORPORATE NAME, OR IN ANY NAME NOT HIS OWN**, and accepting the benefit of such contract, cannot avoid it because he did not employ his own proper name. The rule is the same when the contract is made in such adopted name by his agent, acting under his instructions. *Karns v. Olney*, 101.
3. **ONE WHO ACCEPTS AND RETAINS THE FRUITS OF A VOID JUDGMENT** is estopped from assailing it or denying its validity as against him. This is true, though the court had no jurisdiction over the subject-matter. *Denver City etc. Co. v. Middaugh*, 234.

4. ONE WHO WITH KNOWLEDGE ACCEPTS THE PROCEEDS OF AN UNAUTHORIZED SALE of his property is estopped to dispute the validity of such sale. *Kerns v. Olney*, 101.
 5. VENDORS OF REAL ESTATE ARE ESTOPPED FROM DENYING THE VALIDITY OF A SALE THEREOF made by their agent, not authorized in writing, when such sale is made with their knowledge, and according to their instructions, an installment of the purchase-money paid to them, and the contract of sale concluded in the name of the agent, and the purchaser permitted without objection to take possession and make valuable improvements. *Id.*
 6. ESTOPPEL AS AGAINST HEIRS TO DENY VALIDITY OF LAND SALE.— Where land of a decedent is sold by the probate court for the payment of debts, or for distribution, and the purchase-money is applied by the administrator to the payment of the decedent's debts, or is distributed to the heirs, although the sale may have been so far void as to convey no title at law, the purchaser nevertheless acquires an equitable title to the lands, which will be recognized in a court of equity, and he may compel the heirs to elect a ratification or rescission of the contract of purchase. They are estopped to deny the validity of the sale, and at the same time enjoy the benefits derived from the appropriation of the purchase-money, and this principle applies to minors as well as adults. *Woodstock Iron Co. v. Fullenwider*, 73.
- See AGENCY, 15; BONDS; CORPORATIONS, 7, 8; NEGOTIABLE INSTRUMENTS, 5.

EVIDENCE.

1. DEPOSIT OF LETTER IN A POST-OFFICE, PROPERLY ADDRESSED AND STAMPED, IS PRIMA FACIE EVIDENCE ONLY that the same was received in the ordinary course by mail by the person to whom it was addressed. *German Nat. Bank v. Burns*, 247.
2. KNOWLEDGE OF MARKET VALUE IS FACT KNOWN FROM INFORMATION, and not bare matter of opinion. *Missouri P. R. R. Co. v. Fagan*, 776.
3. GENERAL NOTORITY IS GENERALLY ADMISSIBLE EVIDENCE as tending to prove notice of a fact, when such notice is a material inquiry; but it is never competent evidence to prove the fact itself, which must be shown by other testimony. *Louisville etc. R. R. Co. v. Hall*, 84.
4. NEGLIGENCE.— In an action against a street-railway company for damages for personal injuries, evidence that it was a matter of general knowledge and rumor among the employees that a car had been on the road ever since it was built, is inadmissible, as hearsay and irrelevant. *Wormsdorf v. Detroit City R'y Co.*, 453.
5. NEGLIGENCE.— In an action against a street-railway company for damages for personal injury, evidence of the general reputation of a certain horse, among the employees of the company, as being an unsafe and unreliable horse to drive before a street-car, and that knowledge of such reputation was brought home to the general superintendent of the company, is admissible, as tending to show negligence in the company in providing an unsafe horse, and using it after it knew, or should have known, its unsuitness for the work. *Id.*
6. COPIES OF STATEMENTS MADE TO A COMMERCIAL AGENCY by a merchant as to his financial standing, taken in writing at the time, and shown to have been afterwards approved by him, are admissible in evidence in favor of creditors who have relied upon such statements, and claim them to be fraudulent and false. *Mooney v. Davis*, 425.

7. STATEMENTS TAKEN FROM ACCOUNT-BOOKS, themselves in evidence without objection, are admissible, in connection with such books, to show the financial state of their owner's business at a certain date. *Id.*
 8. CONTENTS OF PAPER WHICH IS BEYOND JURISDICTION OF COURT CAN BE PROVED BY SECONDARY EVIDENCE without accounting for the non-production of the paper. *Manning v. Maroney*, 67.
 9. CONTRACT WHICH MAY NOT BE VARIED BY PAROL. — Memorandum showing the sale of a specific amount of corn, the person to whom sold, the price thereof, and the time when payment is to be made, signed by the sellers, constitutes a contract which parol evidence is inadmissible to vary. *Buhrick v. Cramer*, 645.
 10. A MERE RECEIPT, THOUGH IN WRITING, may be explained by parol evidence. *Id.*
 11. PAROL EVIDENCE TO SHOW COMPROMISE AGREEMENT UPON WHICH JUDGMENT WAS ENTERED. — When a judgment entered upon an oral agreement for a compromise fails to embody the agreement or to recite that it was rendered in accordance with an agreement, parol evidence of such oral agreement is admissible in a suit to recover damages for a breach of the compromise contract. *East Line etc. R. R. Co. v. Scott*, 758.
 12. DECLARATIONS OF RAILWAY CONDUCTOR, ADMISSIBILITY OF. — The declaration of a railway conductor, while running a train, as to the time it will be due at a station on his route, is admissible in evidence. *Missouri Pac. R. R. Co. v. Fagan*, 776.
 13. RES GESTÆ — CONVERSATIONS. — In an action against a street-railway company for damages for personal injury, a conversation between the car-driver and the company's superintendent, as to the cause of the accident, immediately thereafter, is perhaps admissible as part of the *res gestæ*; but a conversation between the same parties as to a past transaction, which was not part of the *res gestæ*, is not admissible to bind the company with notice of the defect claimed in the complaint. *Wormsley v. Detroit City R'y Co.*, 453.
 14. RES GESTÆ — STATEMENT AS TO CAUSE OF INJURY. — Narration of past occurrences as to the manner in which a party had been injured cannot be given in evidence by an attending physician when not necessary to correctly diagnose the case. *Dundas v. City of Lansing*, 457.
 15. JUDICIAL NOTICE — MUNICIPAL CORPORATIONS. — The mayor may take judicial notice of the due publication of the ordinances of a city. *City Council v. O'Donnell*, 728.
 16. COURT MAY TAKE JUDICIAL NOTICE OF LEADING GEOGRAPHICAL FEATURES of the land. And the locality of important lines of railroad, once established, becomes as fixed and permanent and is as well known as any other geographical feature of the country. *Gulf etc. R'y Co. v. State*, 815.
 17. COURT MUST TAKE JUDICIAL NOTICE that the Houston and Texas Central and the Gulf, Colorado, and Santa Fé railroads are parallel and competing lines of railroad in Texas. *Id.*
- See AGENCY, 6; BOUNDARIES; CRIMINAL LAW; NEGLIGENCE, 4-7, 11, 12; NEGOTIABLE INSTRUMENTS, 11, 12; PAYMENT, 1; TRIAL, 7, 8; VENDOR AND VENDEE, 1; WATERCOURSES, 6, 7.

EXECUTIONS.

See EXEMPTIONS; PARTNERSHIP, 4.

EXECUTORS AND ADMINISTRATORS.

1. **EXECUTOR'S AND ADMINISTRATOR'S LIABILITY FOR PURCHASES MADE AT OWN SALE.** — Where an executor, under directions in the will, sold his testator's property, purchasing part of it himself, and paying therefor in confederate money, which, together with the money realized on the sale, he invested in confederate bonds, which afterwards proved worthless, he is liable to the devisees for the amount of his purchase, especially as he afterwards sold it for gold. The statute (sections 1794 and 1795, General Statutes of South Carolina) authorizes the executor to purchase at his own sale, but makes him liable for the actual value of the property so bought, and requires him to give a bond, with surety, to account for the purchase-money of such property. *Finch v. Finch*, 665.
2. **CLOSE OF ADMINISTRATION NOT PRESUMED FROM MERE LAPSE OF TIME.** — In the absence of any statute fixing the term of an administration, an administrator is not relieved from being called to account in the probate court by the mere lapse of time without any action by the court. *Moss v. Brown*, 823.
3. **COLLECTION OF RENTS OF PROPERTY OF ESTATE BY ADMINISTRATOR** is an act done in the administration of the estate, and rebuts any presumption that the administration has been closed so as to deprive the probate court of jurisdiction to compel him to render an account and make settlement. *Id.*

See TRUSTS AND TRUSTEES, 2.

EXEMPTIONS.

1. **RIGHT TO RESIST SERVICE OF PROCESS.** — A sheriff or other officer has no right to take from a debtor, by virtue of process against him, his property which by law is exempt from execution. In such case, the officer levies on the property at his peril, and the law will not protect him; nor is the debtor compelled to submit to such trespass without reasonable resistance. Such is the rule under the Michigan statute. *People v. Clements*, 373.
2. **HORSE, HARNESS, AND BUGGY OF INSURANCE AGENT**, bought by him and used for the purpose of carrying on his business, and necessary to the successful prosecution thereof, are exempt under subdivisions 5 and 8 of section 3 of the Kansas act, relating to exemptions, the claimant being a resident of the state and the head of a family. The horse is exempt as within the description of animals named in said subdivision 5 as absolutely exempt, and the buggy and harness must be held to be within the description of tools and implements used and kept by the debtor for the purpose of carrying on his business, and, therefore, exempt under said subdivision 8. *Wilhite v. Williams*, 281.

See ATTACHMENT AND GARNISHMENT, 5-7; HOMESTEAD, 1; INSURANCE, 8.

EXPERT EVIDENCE

See WITNESSES, 2-5.

EXTRADITION.

1. **WHEN ILLEGAL ARREST IS NOT GROUND FOR DISCHARGE FROM CUSTODY.** — A person illegally arrested in Georgia and brought into Alabama as a fugitive from justice, under extradition proceedings instituted in the latter state after his arrest, cannot claim to be released from cus-

tody on *habeas corpus* because of his illegal arrest, nor because of defects in the warrant on which the extradition proceedings were based, it appearing that the petitioner was held in custody by virtue of a *capias* issued on an indictment since found for the same offense, and that the executive authorities of Georgia, whose laws were violated by the illegal arrest, had made no complaint. *Ex parte Barker*, 17.

2. **MERE FACT THAT PRISONER, BEING FUGITIVE FROM JUSTICE, WAS KIDNAPED** in another state, and brought into the state from which he fled, is alone no reason why he should be released, unless the demand for his release is made by the governor or other executive authority of such foreign state. *Id.*

FIXTURES.

1. **AS BETWEEN VENDOR AND VENDEE OF A MILL**, a steam-boiler and looms used in the mill as necessary parts of the machinery thereof may constitute fixtures of the mill and a part of it, though held in position merely by their own weight. *Cavis v. Beckford*, 554.
2. **WHAT ARE.** — Gun-metal, digester, soap-kettles, boilers, and candle-machines, which are appliances of a permanent character, put into and attached to a building with the intention of making soap and candles, are fixtures, and form a part of the realty. *Lavenson v. Standard Soap Co.*, 147.
3. **TESTS OF.** — To DETERMINE WHETHER A THING IS A FIXTURE OR NOT, we must look at the manner in which it is annexed, the intention of the person who made the annexation, and the purpose for which the premises are used. *Id.*
4. **MORTGAGE.** — A CLAUSE IN THE MORTGAGE that "all boilers, engines, and fixed machinery shall be deemed to be included in said property," cannot be considered as excluding from the mortgage fixtures not specifically mentioned, and which would have been embraced in such mortgage had such clause been omitted. *Id.*
5. **MORTGAGEE, IF FIXTURES SUBJECT TO A MORTGAGE ARE REMOVED UNLAWFULLY**, may, after he has foreclosed his mortgage and ascertained what deficiency remains due him, maintain an action against persons guilty of such removal for the damages occasioned thereby. *Id.*
6. **PERSONAL PROPERTY — BUILDINGS ON LAND OF ANOTHER.** — Buildings placed and standing on the land of another with the right of removal are personal property, and the nature of the property is not changed by the fact that the owner may have such an interest in the land as would enable him to maintain an action of trespass *quare clausum* for an injury to the possession. *Laird v. Railroad*, 564.

See CHATTEL MORTGAGES.

FORGERY.

See ARREST, 2; MALICIOUS PROSECUTION, 2, 6; MORTGAGES, 5.

FRAUD.

1. **IN PLEADING FRAUD, IT IS NOT SUFFICIENT TO ALLEGE IN GENERAL TERMS**, but the facts constituting the fraud must be stated. *Albertoni v. Branham*, 200.
2. **FRAUDULENT SALE.** — WHERE DEFENDANT IS PRESENT, and at liberty, by his testimony, to refute the principal facts, if false, upon which a claim

of fraudulent sale is based, his failure to so testify is a fact patent to the jury, and which plaintiff is entitled to in his favor in the instructions. *Mooney v. Davis*, 425.

3. **CONCEALMENT OR MISREPRESENTATION** of a merchant as to his financial condition need not be willful nor intended in order to constitute a fraud which will vitiate a sale made to him, if such misrepresentations are relied upon. It is sufficient if they have the effect to defraud. *Id.*
4. **QUESTION FOR JURY.** — Where a creditor has relied upon the statements of a merchant as to his financial condition in selling him goods, the question as to whether such representations were false, and therefore a fraud, is to be determined by the jury from all the facts in the case. *Id.*
5. **STATEMENT TO COMMERCIAL AGENCY.** — If, after a merchant has made a statement to a commercial agency as to his financial condition, there is a change for the worse therein, it is his duty to notify such agency, that parties with whom he has commercial dealings may not be misled as to the extent of credit they may safely give; otherwise, the merchant is bound by his statement. *Id.*

See **EQUITY**, 11; **EVIDENCE**, 6; **INSURANCE**, 9; **JUDICIAL SALE**, 6; **NEGOTIABLE INSTRUMENTS**, 7; **PAYMENT**, 2; **REPLEVIN**, 3.

FRAUDULENT CONVEYANCES.

1. **A PURCHASE OF LAND BY ONE IN TRUST FOR ANOTHER** by a party not indebted at the time is void as to subsequent creditors of the purchaser without notice, when the intent is to secure the property against future ventures, and where the deed is not recorded, and the purchaser retains possession, leases the premises, uses the rent as his own without objection, and returns the land for taxation in his own name. *Bates v. Cobb*, 742.
2. **DEED OF LAND TO ONE IN TRUST**, if left unrecorded, is void as to subsequent creditors of the purchaser without notice, and who trusted him on the faith of his ownership. *Id.*
3. **SALE MADE BY VENDOR FOR PURPOSE OF PAYING HIS DEBTS IS NOT FRAUDULENT**; and where there is testimony tending to show that it was made for that purpose, the defendant has the right to have the jury pass upon the testimony on that issue. *Weaver v. Nugent*, 792.
4. **GIFT BY HUSBAND TO WIFE OF LOTTERY PRIZE, VALIDITY OF.** — If at the time a wife purchases a lottery ticket her husband agrees that whatever prize may be drawn thereon shall be her separate property, and the money, when drawn, is placed in bank in her name as her separate property, these facts, as between the husband and wife, are sufficient to constitute the money her separate property. But to sustain the validity of such gift as against creditors of the husband, the wife must show that, at the time of the transaction, he had ample means readily and conveniently accessible to his creditors, and to the ordinary process used in the collection of debts; otherwise the conveyance to her will be held fraudulent as against his creditors. *Dixon v. Sanderson*, 801.
5. **THE UNCONTRADICTIONED TESTIMONY OF BOTH HUSBAND AND WIFE**, that at the time he made a gift to her he had ample means to pay all his debts, is sufficient to sustain the validity of the gift. And where this testimony is taken by deposition, and no effort is made by the opposite party to ascertain by cross-examination what property besides that given by the husband to the wife remained in his hands after the gift, and

they apply for a postponement of the trial to enable them to be present at the trial and testify more fully than they had done in the depositions, but their application is refused upon the objection of the opposite party, the latter cannot complain if full effect be given to such uncontroverted testimony. *Id.*

6. KNOWLEDGE ON THE PART OF A GRANTEE THAT A TRANSFER WAS INTENDED TO DEFRAUD CREDITORS OF THE GRANTOR is necessary to avoid such conveyance, if it was made on full consideration; knowledge that the grantor was insolvent is not sufficient. *Albertoli v. Branham*, 200.
7. ANSWER ASSERTING THAT TRANSFER WAS FRAUDULENT. — In an answer seeking to justify the levy of a writ upon property which had been transferred by the defendant in execution, an averment that such transfer was made for the purpose of hindering, delaying, and defrauding the creditors of the grantor is not sufficient. It must go further, and show that he had no other property subject to execution out of which his debts could be satisfied. This is because the transfer is good between the parties, and will not be set aside unless necessary for the protection of creditors. *Id.*
8. PRIORITY OF CREDITOR PROCEEDING TO SET ASIDE FRAUDULENT TRANSFER. — Where a debtor makes an assignment of his property in fraud of his creditors, they may, in a court of equity, have it set aside, and the creditor who first files his bill obtains thereby a priority, and is entitled to be first paid out of the proceeds of the sale of the property, if there are no valid prior liens. *Clark v. Figgins*, 860.
9. CREDITORS ENTITLED TO PRIORITY WHEN. — Where suit is brought to enforce an assignment, and certain creditors file answers attacking the assignment as fraudulent, such answers may be regarded as cross-bills, and if they succeed, they will be entitled to the same preference as if they had filed a bill to have the assignment set aside as fraudulent. And if, upon being defeated in the court below, they alone appeal, and procure a reversal of the decree, and have the assignment declared void, they will be entitled to be first paid out of the proceeds of the property assigned, if there were no valid prior liens at the time when they filed their answers. *Id.*

See EQUITY, 10, 11.

GIFTS.

See FRAUDULENT CONVEYANCES, 4, 5.

GUARANTY.

- GUARANTOR OF PROMISSORY NOTE, LIABILITY OF. — One who, before maturity, guarantees the payment of a promissory note, becomes liable absolutely upon the default of the maker, and is not discharged from such liability by the failure of the holder to sue the maker, although the latter becomes insolvent. *Huff v. Sife*, 497.

GUARDIAN AND WARD.

1. GUARDIAN IS BOUND TO PROTECT THE RIGHTS OF HIS WARDS, and is not only accountable for their money which he has received, but also for what it was his duty to collect. *Butler v. Legro*, 573.
2. SETTLEMENT OF ACCOUNT BETWEEN. — When, on settlement of his account, the guardian does not account for a sum which it was his duty to

collect, and did not, and the matter was not brought to the attention of the court, and the question of his liability therefor was not raised and considered in that settlement, the error may be corrected in a further account, ordered, after his resignation, on the petition of his successor. *Id.*

HABEAS CORPUS.

See EXTRADITION, 1.

HOMESTEAD.

1. ACQUISITION OF NEW HOMESTEAD IS ABANDONMENT OF OLD ONE, and whether the new homestead is one or not is to be determined by the questions, Is it the residence of the family, and is it the intention to occupy it as the home of the family? It is not error, therefore, to refuse a charge that the claimant of a homestead exemption should show an abandonment of a former homestead in order to establish the exemption claimed. *Weaver v. Nugent*, 792.
2. PROBATE HOMESTEAD CANNOT BE SET APART OUT OF PROPERTY WHICH COULD NOT HAVE BEEN DEDICATED AS A HOMESTEAD IMMEDIATELY PRECEDING the death of decedent. *Estate of Ackerman*, 116.
3. PROBATE HOMESTEAD CANNOT BE SET ASIDE WHEN THERE EXISTS AT THE DEATH OF DECEDENT A HOMESTEAD DULY DEDICATED, though such homestead has been sold by the survivor before the application for the probate of the homestead is made. *Id.*

See HUSBAND AND WIFE, 2; MARRIED WOMEN, 1, 2.

HOMICIDE.

See CRIMINAL LAW, 13, 17-21.

HUNTING RIGHTS.

See ANIMALS; PUBLIC LANDS, 3, 4.

HUSBAND AND WIFE.

1. LOTTERY PRIZE DRAWN BY WIFE, COMMUNITY PROPERTY WHEN. — A prize drawn on a lottery ticket bought by a wife with her separate money is not acquired by gift, devise, or descent, and is not therefore her separate property, but the common property of the husband and wife. *Dixon v. Sanderson*, 801.
2. HOMESTEAD IN COMMUNITY PROPERTY VESTS ON THE DEATH OF A WIFE in her husband without administration, and subject to no other liability than such as has been created under the provisions of the law of homesteads. The death of one of the spouses does not in any way alter the estate or the character of the homestead. *Estate of Ackerman*, 116.
3. COMMUNITY PROPERTY PURCHASED BY THE WIFE ON THE CREDIT OF HER HUSBAND NEED NOT BE REDUCED TO HIS POSSESSION to impress it with the quality of community property. *People v. Swalm*, 96.
4. COMMUNITY PROPERTY. — POSSESSION OF WIFE IS THAT OF HER HUSBAND as to community property. The wife's interest in such property is a mere expectancy. *Id.*
5. IF PERSONAL ORNAMENTS OF A WIFE in her exclusive possession, and suitable to her condition in life, may be presumed to be her separate property, this presumption is sufficiently rebutted when the husband testifies

- that they have been acquired during the marriage; that he had never given them to her, and that they were not her exclusive property. *Id.*
6. **SEPARATE PROPERTY OF WIFE.** — PROPERTY BOUGHT BY A WIFE ON THE CREDIT OF HER HUSBAND, without his previous authority, but eventually paid for by him, and which he never gave to her as her own, is not her separate estate; and in an indictment for larceny, it is properly charged to be the property of her husband. *Id.*
7. **WIFE IS NOT ENTITLED TO HER EARNINGS AS AGAINST CREDITORS** of her husband, and real estate purchased with such earnings is subject to his debts, notwithstanding an agreement or understanding between him and her that the earnings were to be hers. And if upon the real estate so purchased with her earnings she puts valuable improvements with means not furnished by her husband, his creditors may subject the whole property, including the improvements, to the payment of their judgment. *Bailey v. Gardner*, 847.
8. **BY KANSAS COMPILED LAWS OF 1835, CHAPTER 62, WIFE IS PLACED ON EQUALITY WITH HUSBAND** in respect to holding, controlling, and disposing of property which she may own at the time of her marriage, or which may afterward be acquired by her. The right of the husband to act as the agent of the wife, and to contract with her, is recognized, and the conveyance of real estate directly from the husband to the wife will be upheld, so far as it is equitable to do so. *Munger v. Baldrige*, 273.
9. **WIFE MAY APPOINT HER HUSBAND BY POWER OF ATTORNEY AS HER AGENT AND ATTORNEY IN FACT**, to convey the inchoate interest which she holds in his real estate, and an instrument duly executed by himself, and by him for her under such authority, is effectual to transfer such interest. *Id.*
- See **CRIMINAL CONVERSATION; FRAUDULENT CONVEYANCES, 4, 5; MARRIED WOMEN.**

INDICTMENT.

See **CRIMINAL LAW.**

INFANTS AND INFANCY.

1. **BURDEN OF PROOF TO SHOW RATIFICATION OF CONTRACT.** — In an action on a note executed by a minor, the burden of proof is on plaintiff to show that the minor ratified the note after he attained his majority. *Tyler v. Gallop*, 336.
2. **RATIFICATION OF CONTRACT — PRESUMPTION.** — The mere silence of the maker of a note for two years after attaining majority does not raise the presumption of ratification, if the note was given during his minority. There must be an express promise after he becomes of age, or such acts as are equivalent to a new contract. *Id.*
3. **EMANCIPATION OF MINOR** at the time of executing a note is irrelevant to the issue in a suit on the note, as it does not affect his liability. *Id.*

See **LIMITATION OF ACTIONS; NEGLIGENCE, 14.**

INJUNCTIONS.

See **CORPORATIONS, 12; PLEADINGS, 12.**

INSTRUCTIONS.

See **TRIAL, 10-13.**

INSURANCE.

1. **AGENCY TO PROCURE INSURANCE IS ENDED** when the policy is procured and delivered to the principal, and the agent has no power, after the policy is so delivered, to consent to a cancellation, or to accept notice of an intended cancellation by the insurer. *Insurance Companies v. Raden*, 36.
2. **DUAL AGENCY—NOTICE OF CANCELLATION OF POLICY.**—Provision in policy of insurance authorizing the company at any time to terminate the insurance, on notice to that effect to the insured, "or to the person who may have procured the insurance to be taken," is not susceptible of being construed as applicable to a case where the same person acted as agent for both parties in procuring and issuing the policy, and notice was not given to the insured in person. *Id.*
3. **RATIFICATION OF CANCELLATION OF POLICY BY INSURED WILL NOT BE PRESUMED** from his acceptance, after a loss of a policy procured by the same agent in another company, when it is not shown that all the facts bearing on the case were disclosed to the insured, and that he was fully informed of his legal rights as governed by them; nor will such ratification be presumed from the institution of a suit on the substituted policy, induced by the agent's misrepresentations to the attorneys of the insured. *Id.*
4. **AGENT OF INSURANCE COMPANY IN PREPARING APPLICATION IS AGENT OF COMPANY.** The agent of an insurance company who is authorized to procure applications for insurance and to forward them to the company for acceptance must be deemed the agent of the company in all he does in preparing the application or in any representation he may make as to the character or effect of the statement therein contained; and when, either by his instruction or direct act, such agent makes out an application incorrectly, notwithstanding all the facts are correctly stated to him by the applicant, the error is chargeable to the company. And this rule is not affected or changed by a stipulation inserted in the policy, subsequently issued, that the acts of such agent in making out the application shall be deemed the acts of the insured, unless written in the application or expressed in the policy. Such stipulation does not convert the acts done for the insurer into the acts of the insured. Where, therefore, a husband, in making application for insurance on his wife's property, informs the company's agent, authorized to procure such applications, that the property belongs to his wife, but the agent, contrary to his instructions, and without his knowledge, makes out the policy in his name instead of that of his wife, the policy will be binding upon the company, and the husband may sue upon it in his own name for the use of his wife; and in such action parol evidence is competent to prove that the application was filled up by such agent, and that the facts were fully and correctly stated to him, but that he, without the knowledge of the insured, misstated them in the application. *Deitz v. Insurance Co.*, 909.
5. **FIRE—CONSTRUCTION OF PROHIBITIVE CLAUSE IN POLICY.**—Where a stipulation provides that the policy shall be avoided by the use of an article expressly named, and there is nothing in the policy from which a permission to use the article in a partial, limited, or temporary way can be inferred, full effect is usually given to the prohibitive clause by a forfeiture of the policy for its violation. *Wheeler v. Traders' Ins. Co.*, 582.

6. FIRE — VIOLATION OF CONDITION IN POLICY FORFEITING INSURANCE. — Stipulation in policy, that "if the assured shall keep or use . . . petroleum, naphtha, gasoline, benzine, benzole, or benzine varnish, or keep or use camphene, spirit gas, or any burning fluid or chemical oils, without written permission in this policy, then, and in every such case, this policy is void, and all insurance thereunder shall immediately cease and determine," is a part of the contract of insurance, and a reasonable restriction against the use of dangerous and combustible materials; and the use by the assured of naphtha or benzine on the insured premises avoids the policy and forfeits the insurance, unless such use was one incidental to the business, adopted from necessity or custom, and recognised by the insurer, or was in small quantities for a special and not dangerous purpose. *Id.*
7. FIRE — POLICY RENDERED VOID BY NON-OCCUPATION OF INSURED PREMISES IS NOT REVIVED BY SUBSEQUENT REOCCUPATION. — A policy of fire insurance which has become void by reason of the violation of a condition therein, that the insured premises should not be unoccupied for a period of more than ten days without the consent of the insurer indorsed on the policy, is not revived when occupation of the premises is subsequently resumed. *Moore v. Phoenix Ins. Co.*, 556.
8. WHO ENTITLED TO PROCEEDS OF POLICY ON LIFE OF HUSBAND FOR BENEFIT OF WIFE AND CHILDREN. — Under provisions of Alabama code of 1876, sections 2733, 2734, the husband might insure his own life for the benefit of his wife, making the insurance payable to her children in case she died before him, and when so made payable, the proceeds of the policy could not be subjected by the husband's creditors to the payment of his debts. But upon the death of the wife before her husband, her interest in the policy ceased, and the policy being made payable to the wife, "her heirs, executors, or assigns," her children could acquire no interest which would be exempt from the claims of the husband's creditors on his subsequent decease. *Tompkins v. Levy*, 31.
9. RESERVATION IN LIFE POLICY CONSTRUED AS IN FRAUD OF CREDITORS. — A policy taken out by a husband on his own life, payable to his wife, "her heirs, executors, or assigns," the insured paying the premiums out of his own funds, expressly provided that after the expiration of fifteen years, on surrender of the policy, none of its conditions having been violated, the company would pay to the insured, "his heirs, executors, or assigns," the equitable value of the policy, "as an endowment in cash." It was held that such reservation for the beneficial use of the insured himself rendered the policy fraudulent as against his creditors. *Id.*

INTEREST.

INTEREST ON VALUE OF PROPERTY DESTROYED BY NEGLIGENCE ALLOWED, WHEN. — The owner of property destroyed by the negligence of another is entitled to interest on the value of such property from the time of its destruction. *Fremont etc. Ry Co. v. Marley*, 482.

See BETTERMENTS.

INTERSTATE COMMERCE.

See RAILROAD COMPANIES, 24.

INTOXICATING LIQUORS.

See COVENANTS, 3, 4; MUNICIPAL CORPORATIONS, 9.

JUDGMENTS.

1. **PRESUMPTION IN SUPPORT OF JUDGMENT.** — Where a defendant pleads the ten years' limitation, and the record shows that he had occupied the land sued for with exclusive possession since 1873, and that such possession was "continuous, adverse, and peaceable to this date," but the record does not disclose the date of the commencement of the suit in which judgment was rendered in 1886, it will be presumed, in support of a judgment of the court sustaining the defense of the statute of limitations of ten years, that the possession was peaceable until the commencement of the suit, and that the petition was filed more than ten years after the adverse occupancy began. *Moody's Heirs v. Moeller*, 839.
2. **VOID JUDGMENT, EFFECT OF.** — **ABSENCE OF LEGAL SERVICE OR AUTHORIZED APPEARANCE IS JURISDICTIONAL**, and without jurisdiction no judgment can be entered under which any rights can be lost or acquired. *Great West Min. Co. v. Woodmas etc. Min. Co.*, 204.
3. **JUDGMENT IS CONCLUSIVE BETWEEN THE PARTIES**, NOT ONLY AS TO SUCH MATTERS as were in fact determined in that proceeding, but as to every other matter which the parties might have litigated as incident to or essentially connected with the subject-matter of the litigation, whether the same, as a matter of fact, were or were not considered. *Denver City etc. Co. v. Middaugh*, 234.
4. **FORMER JUDGMENT, WHEN INADMISSIBLE.** — In an action by a father to recover damages occasioned by the injury of his minor son through the negligence of the defendants, a judgment in favor of the son for his damages resulting from the same accident is inadmissible. Such judgment is *res inter alios acta*. *Bridger v. Asheville etc. R. R. Co.*, 653.

See ATTORNEY AND CLIENT, 5; EQUITY, 8.

JUDICIAL NOTICE.

See EVIDENCE, 15-17.

JUDICIAL SALES.

1. **IT IS DUTY OF SHERIFF, AT TIME OF MAKING SALE, TO COLLECT THE PURCHASE-MONEY**, and where he fails to collect all of the purchase-money at a sale of real estate made by him on an order of sale, and afterward makes his return showing such sale to have been regular, and allows it to be confirmed, it is then too late for him to contradict the recitals of his return by showing that he has not received the purchase-money. *Studebaker v. Johnson*, 287.
2. **JURISDICTION OF SUIT TO SET ASIDE SHERIFF'S SALE OF LAND.** — A justice's court has not jurisdiction of a suit brought to set aside a sheriff's sale of land made under an execution issued on a judgment rendered in a justice's court. The district court is the proper court in which to bring such suit. *Weaver v. Nugent*, 792.
3. **PROPER PARTIES IN SUIT TO AVOID JUDICIAL SALE OF LAND.** — Where land sold under execution for a nominal price had been previously conveyed by the defendant in execution by warranty deed to a purchaser, who gave his promissory note for the purchase price thereof, whether the conveyance was fraudulent or *bona fide*, such defendant has an interest in the land, which, if injured by such execution sale, he has a right to protect, in a suit brought by the plaintiff in execution to recover the land. *Id.*

4. PROCEEDINGS AT JUDICIAL SALE MUST BE AT LEAST REGULAR in order to pass title, when there is practically no consideration. *Id.*
5. INADEQUACY OF PRICE AT JUDICIAL SALE DUE TO ACT OF DEFENDANT IN EXECUTION. — Inadequacy of price at a judicial sale, caused by any act done by the defendant in execution, or by his direction or authority, is not ground for setting aside the sale. To justify the setting aside of the sale, it must be shown that there were irregularities, and that they tended to cause the inadequacy, and were not caused by the defendant. *Id.*
6. CONFIRMATION OF SALE — AGREEMENT NOT TO RESIST. — AGREEMENT BETWEEN A PURCHASER AT A PARTITION SALE AND A TENANT IN COMMON, who believes that the common property has been sold for much less than its value, that the latter will not object to such sale, and will permit it to be confirmed by the court, and that the former will thereupon pay the latter one thousand dollars, is a fraud upon the court and the parties to the action, and no court will aid either party to enforce it. *Tappan v. Albany Brewing Co.*, 174.
7. THOUGH REAL ESTATE SOLD UNDER A JUDGMENT HAS PASSED TO THIRD PARTIES, this will not defeat the right of the plaintiff to avoid such sales by showing want of jurisdiction in the court entering such judgment. *Great West Min. Co. v. Woodmas etc. Min. Co.*, 204.
8. RELIEF WILL BE GRANTED FROM A SALE BASED UPON A JUDGMENT entered without service of process upon or appearance on behalf of the defendant, without inquiring as to the merits of the original claim. Although a just cause of action exists against the defendant, he must be allowed an opportunity to pay the debt, or redeem the property from sale, before his title thereto can be divested by judicial proceedings. *Id.*
9. ALL SALES OR OTHER PROCEEDINGS BASED UPON A JUDGMENT SECURED THROUGH THE UNAUTHORIZED APPEARANCE OF AN ATTORNEY are as to all persons, irrespective of notice or *bona fides*, absolute nullities. *Id.*
10. MARSHAL'S SALE OF LAND, WHEN VOID. — A marshal's sale of land under execution from a United States court, made before the door of the United States court-house, and not before the door of the court-house of the county in which the land is situated, is void, is incapable of ratification, and may be attacked collaterally. *Moody's Heirs v. Moeller*, 839.
11. MERE ACQUITTANCE OF DEFENDANT IN EXECUTION IN VOID JUDICIAL SALE gives no validity to the sale. *Id.*

See ESTOPPEL, 3-6; MORTGAGES, 6; TENDER, 2.

JURISDICTION.

1. JURISDICTION OF CONDEMNATION PROCEEDINGS. — County courts of Colorado have no jurisdiction in condemnation proceedings where the award exceeds two thousand dollars. *Denver City etc. Water Co. v. Middaugh*, 234.
 2. PERSONAL PROPERTY — JURISDICTION. — Buildings placed on the land of another with the right of removal, being personal property, an action for damages for injury thereto is transitory, and the plaintiff's right may be enforced in the courts of New Hampshire, though the buildings stood upon the land of another in Vermont. *Laird v. Railroad*, 564.
- See ATTACHMENT AND GARNISHMENT, 3; ATTORNEY AND CLIENT, 4, 5; CONSTITUTIONAL LAW 3; JUDGMENTS, 2, JUDICIAL SALES, 2, 7-9; JUNCTIONS OF THE PEACE.

JURY AND JURORS.

1. **CONSTITUTIONAL LAW—RIGHT OF TRIAL BY JURY.**—General constitutional provisions securing the right of trial by jury relate only to that character of cases in which the right existed at the time of their adoption. Therefore, if municipal courts had the right to try, without a jury, offenders for violating ordinances at the time of the adoption of the constitution, they still have the power, notwithstanding the fact that the constitution secures to all the right of trial by jury. *City Council v. O'Donnell*, 728.
 2. **TRIAL BY JURY IN COMMON-LAW CASES** is guarded by a large number of provisions designed to procure a fair and impartial trial, extending from the jury-lists through the process of selecting and summoning regular jurors and talemen to the completion of the panel through challenges and other tests. All the provisions, whether statutory or not, belong to the machinery devised for the common-law courts, and cannot be adopted without new and careful legislation to chancery practice. *Brown v. Buck*, 438.
- See **APPEAL AND ERROR**, 9; **LIBEL AND SLANDER**, 11; **MUNICIPAL CORPORATIONS**, 6, 7; **NEW TRIAL**, 2; **TRIAL**, 5, 6.

JUSTICES OF THE PEACE.

JUDGMENT RENDERED BY JUSTICE OF PEACE WITHOUT SERVICE upon or appearance of the defendant is void; but as such judgment, even though rendered upon the verdict of a jury, may be set aside by the circuit court upon a writ of *certiorari*, the defendant cannot obtain relief against it in a court of equity. *Railway Co. v. Ryan*, 865.

See **ATTACHMENT AND GARNISHMENT**, 2.

LACHES.

1. **LACHES IN SUING FOR A SPECIFIC PERFORMANCE OF A CONTRACT FOR THE SALE OF REAL ESTATE** will not defeat plaintiff, if such delay was the result of the acts of the defendants or their predecessors in interest in attempting to deceive the plaintiff, and to deprive him of the benefit of his contract. *Karns v. Olney*, 101.
2. **CLOUD ON TITLE**—Where there is capacity to sue in court of equity, so as to sweep away a cloud on the plaintiff's title, and, by an offer to do equity, to have the equitable title of the defendant, acquired at a void sale, divested out of him by a decree of a court of equity, a failure to exercise this right for over twenty years is such laches as authorizes the inference that the right to do so is barred in some one of the modes in which that result may be effected. *Woodstock Iron Co. v. Fullenwider*, 73.
3. **LACHES OR DELAY ALONE WILL NOT PRECLUDE THE ASSERTION OF AN EQUITABLE RIGHT**, WHEN THE NEGLECT TO MORE PROMPTLY ASSERT such right has not lulled the adverse party into doing that which he would not have done, or into omitting to do that which he would have done, in reference to the property, had the right been more promptly asserted. *Great West Min. Co. v. Woodmas etc. Min. Co.*, 204.
4. **IF REAL PROPERTY IS SOLD UNDER A JUDGMENT ENTERED IN AN ACTION IN WHICH THERE WAS NO SERVICE OF PROCESS** upon the defendant, nor any authorized appearance by an attorney on his behalf, and if the defendant had no notice of such judgment, nor of the sale of such

property until the time for redemption had expired, and if the defendant, as soon as he obtained information of the fraud perpetrated upon him, was diligent in employing counsel and commencing suit, he is not barred by laches from maintaining an action for relief from such judgment, and to recover such property, although such action was not brought until three years after the perpetration of the fraud complained of, and eighteen months from the time of the execution of the sheriff's deed. *Id.*

See PRESCRIPTION.

LARCENY.

See CRIMINAL LAW, 22-25; HUSBAND AND WIFE, 6.

LEGACIES.

See WILLS.

LIBEL AND SLANDER.

1. PETITION FOR LIBEL MUST SET OUT VERY LANGUAGE RELIED ON as libelous, and not merely the substance and meaning of the language. *Runge v. Franklin*, 833.
2. COMPLAINT IN LIBEL SUIT SHOULD PUT COURT IN POSSESSION OF THE LIBELOUS MATTER published, the language used, with such innuendoes as are necessary to explain what was meant by the language and to whom it applied. If the libel complained of consists in reporting the plaintiff's standing as a merchant "in blank," the complaint should state the fact with such explanations as to what was meant by the report as are necessary to show that the report was injurious and defamatory. *Bradstreet Co. v. Gill*, 768.
3. MALICE MAY BE INFERRED FROM FACT OF FALSE PUBLICATION of libelous matter, when the communication is not privileged. *Id.*
4. PRIVILEGED COMMUNICATIONS, PUBLICATION OF, ACTIONABLE WHEN. — A privileged publication is actionable only when express malice is shown to have instigated it, or such gross disregard of the rights of the person injured as is equivalent to malice in fact. *Id.*
5. PRIVILEGED COMMUNICATIONS, PUBLICATIONS OF COMMERCIAL AGENCIES ARE NOT, WHEN. — Publications of commercial agencies issued to their subscribers generally are not privileged communications; they are only so when made in confidence to a subscriber who is interested in the pecuniary standing of the merchant reported. *Id.*
6. COMMERCIAL AGENCY IS LIABLE FOR FALSE AND DEFAMATORY PUBLICATIONS, where other citizens would be liable. *Id.*
7. PRIVILEGED PROCEEDINGS. — Proceedings in courts of justice, legislative proceedings, and petitions and memorials to legislatures are absolutely privileged, and cannot be made the basis of an action for libel. *Runge v. Franklin*, 833.
8. PRIVILEGE, WHEN ABSOLUTE, IS COMPLETE DEFENSE to an action for libel, and cannot be rebutted or overcome by evidence that the publication was false and malicious. *Id.*
9. INDICTMENT FOR LIBEL WHEN THERE HAS BEEN NO PUBLICATION, EXCEPT TO THE PARTY LIBELED, must aver that the paper was written or sent with the intent to provoke a breach of the peace. *State v. Sypkret*, 616.
10. THERE IS NO PUBLICATION OF A LIBEL WHERE IT CONSISTS OF A SEALED LETTER SENT TO THE PERSON upon whom it reflects, and he,

because of his inability to read, has it read to him by his wife, there being no evidence that this inability to read was known to the person who sent such libel, nor any averment that it was sent for the purpose of provoking a breach of the peace. *Id.*

11. **PROVINCE OF JURY — CONSTITUTIONAL LAW.** — Notwithstanding the provision of the constitution of South Carolina "that in all indictments for libel the jury shall be the judges of the law and the facts," the law defining libel remains as before. The principal result of this provision is simply to secure to the jury, by fundamental law, the right to render a general verdict, under an indictment for libel, as in other cases. It is therefore the duty of the presiding judge, upon the trial of an indictment for libel, to declare to the jury the law applicable thereto; and if he errs in so doing, such error may be reviewed on appeal as in other cases, unless the defendant is acquitted, in which case he cannot again be put upon his trial. *Id.*
12. **SLANDER — WHOLE CONVERSATION ADMISSIBLE IN EVIDENCE.** — In an action of slander, plaintiff should be permitted to give the whole conversation in evidence, and all the words spoken by defendant, so long as they are part of the same transaction, and led up to the words charged in the declaration to have been spoken by defendant of and concerning plaintiff. *Newman v. Stein*, 447.
13. **WHERE ACTUAL MALICE IS SHOWN** in an action of slander, the jury may always give exemplary damages. *Id.*
14. **DAMAGES.** — Where the words spoken in an action of slander are actionable *per se*, and defendant was actuated by malice, and wantonly intended to charge plaintiff with being unchaste, exemplary damages are recoverable. But if the words were spoken in the heat of passion, under provocation from plaintiff, this is such evidence of want of malice that the jury should consider it in mitigation of damages. *Id.*
15. **DAMAGES.** — In actions of slander, where the words are not actionable *per se*, the plaintiff must both allege and prove that by reason of the words he has sustained some damages of a pecuniary nature; but where the words are actionable *per se*, no special damages need be alleged or proved, and the jury are warranted in giving such damages as shall compensate the plaintiff for the wrong and injury done, according to the circumstances of each case. *Id.*
16. **EXEMPLARY DAMAGES.** — Under an allegation in slander, that plaintiff is greatly injured in her good name, fame, credit, and reputation, the jury would be warranted if they found that defendant spoke, uttered, or published the words alleged of and concerning plaintiff in awarding punitive or exemplary damages, if the facts proved show express and wanton malice. *Id.*
17. **MITIGATION.** — In an action of slander, defendant should be allowed to testify in mitigation to provoking language used to him by plaintiff which caused him to utter the words charged as slanderous. The law makes allowances for the infirmities of human nature, and for what is done in the heat of passion, produced by the improper conduct of the adverse party. *Id.*
18. **BURDEN OF PROOF** is on plaintiff in an action of slander to show substantially that defendant spoke the words as charged in the declaration. This does not, however, exclude other words spoken in the same conversation. *Id.*

LIMITATION OF ACTIONS.

RUNNING OF STATUTE OF LIMITATIONS IS NOT STOPPED BY COVERTURE OR MINORITY of the heirs after it has commenced against the ancestor. *Moody's Heirs v. Moeller*, 839.

See ADVERSE POSSESSION, 2; ESTATES, 4; PLEADING, 14; TRUSTS AND TRUSTEES, 3.

LIS PENDENS.

1. **A PURCHASER OF REALTY PENDENTE LITE**, whether the action be at law or in equity, takes subject to any title or interest adverse to that of his grantor ultimately recognized in the pending litigation. *Cheever v. Minton*, 258.
2. **DURING THE INTERVAL BETWEEN FINAL JUDGMENT AND THE COMMENCEMENT OF PROCEEDINGS ON ERROR**, there is no suit pending, and a purchaser in good faith does not take title *pendente lite*, and is not affected by a subsequent appeal or writ of error and the reversal of judgment thereon. *Id.*
3. **NOTWITHSTANDING A STATUTE** provides for a filing of notice of the pendency of an action, and "that from the time of filing such notice only shall the pendency of the action be constructive notice to a purchaser or encumbrancer from a party affected thereby," a purchaser of the property in controversy in such action is not affected by said notice unless his purchase is during the pendency of the action, and it is not during such pendency if final judgment has been entered therein, though such judgment is ultimately reversed on a writ of error subsequently sued out. *Id.*

LOGS AND LOGGING.

See WATERCOURSES.

MALICIOUS ATTACHMENT.

See MALICIOUS PROSECUTION, 7-14.

MALICIOUS PROSECUTION.

1. **COUNTS FOR MALICIOUS PROSECUTION** and false imprisonment may be joined under the Michigan practice. *Haskins v. Ralston*, 376.
2. **A DECLARATION FOR MALICIOUS PROSECUTION** alleging that defendant caused plaintiff's arrest on a warrant charging him with having committed an offense punishable by law, to wit, uttering and publishing as true a certain false, forged, and counterfeited note, for the payment of money, knowing said note to be false, forged, etc., with intent to injure and defraud, correctly describes an offense of which a justice has jurisdiction to hold an examination for commitment for trial at the circuit court. *Id.*
3. **A DECLARATION FOR MALICIOUS PROSECUTION** alleging that plaintiff was not only finally discharged, but duly discharged and fully acquitted, charges, inferentially at least, that the arrest was for examination before a justice, as there could be no discharge, joined with an acquittal, except upon a hearing upon the charge. *Id.*
4. **A DECLARATION ALLEGING THAT DEFENDANT MALICIOUSLY**, and without reasonable or probable cause, and without investigation or inquiry to

- ascertain the truth thereof, caused plaintiff to be arrested and imprisoned for a certain number of days, at the expiration of which time he was duly discharged and fully acquitted, clearly charges malicious prosecution, and not illegal arrest and false imprisonment. *Id.*
5. **NECESSARY AVERMENTS IN CHARGING OFFENSE.** — The Michigan constitution and statutes only require that, in charging an offense, such description be used as will fully inform the person charged as to what he has to meet, and of the nature of the accusation against him. *Id.*
 6. **AVERMENT — INTENT.** — The term "forged," in law, indicates a fraudulent intent and purpose in making the writing. *Id.*
 7. **THE MALICIOUS PROSECUTION OF A CIVIL SUIT,** and especially the swearing out of a false attachment without probable cause, is actionable, without an arrest or seizure of property. *Brand v. Hinchman*, 382.
 8. **ATTACHMENT SUIT.** — In order to maintain an action for the malicious suing out of a writ of attachment, it is not necessary that the attachment must have been discharged, or otherwise terminated in favor of plaintiff; nor is the settlement of the debt by him, and the payment of costs, a bar to the maintenance of an action for malicious prosecution, if the attachment was malicious and without probable cause. *Id.*
 9. **CONSTRUCTIVE SERVICE OF MALICIOUS WRIT OF ATTACHMENT.** — The act of an officer in going into plaintiff's store with a writ of attachment, showing it to him, and remaining there for the purpose of preventing any goods going out, is such constructive service of the writ or taking possession of the goods as will support an action of malicious prosecution, if the writ is sued out maliciously. *Id.*
 10. **PROBABLE CAUSE** for suing out a writ of attachment is such cause as the generality of business men of care and prudence would act upon under like circumstances; and the fact that plaintiff in an action of malicious prosecution neglected to pay the debt, or was careless in the conduct of his business, is not sufficient to justify the belief that he is about to dispose of or conceal his property with intent to defraud his creditors. Such probable cause must be founded on competent evidence, and unless so founded, the suing out of the writ of attachment is malicious, and the jury must so find. *Id.*
 11. **WANT OF PROBABLE CAUSE** in itself raises a presumption of malice. *Id.*
 12. **PROBABLE CAUSE.** — If defendant in an action for malicious prosecution for maliciously suing out a writ of attachment honestly believed that he had probable cause, he would not be liable, though in reality there was no probable cause; but the jury must determine whether he honestly believed that he had probable cause, and this can be determined only by ascertaining what careful and prudent men would have done under like circumstances. *Id.*
 13. **EVIDENCE.** — In an action for malicious prosecution in maliciously suing out a writ of attachment, evidence that notice of the attachment was published in a newspaper, and of the circulation of such paper, is admissible, as tending to show the publicity given the matter and the business injury resulting therefrom. *Id.*
 14. **EVIDENCE.** — In an action for malicious prosecution in maliciously suing out a writ of attachment, evidence is admissible to show that plaintiff's business reputation was good before the writ was sued out, and the jury must determine whether a refusal of credit was attributable to that or to other causes. *Id.*

MANDAMUS.

1. WHO MAY BE RELATOR IN APPLICATION FOR MANDAMUS. — In the case of an application for *mandamus*, where private or corporate rights are affected, the relator must show an interest; but if the state is the real party, and the relator the mere informer, to procure the enforcement of a mere public duty, then a private individual may become the relator. *State ex rel. v. City of Kearney*, 493.
2. MANDAMUS IS PROPER REMEDY to compel an original hearing in a chancery suit. *Brown v. Buck*, 438.
3. MANDAMUS IS PROPER ACTION TO RESTORE OFFICER TO OFFICE from which he has been illegally ousted, whether by removal or suspension; and a restoration to office should be accompanied by a restoration of all the records, instruments, and insignia of office of which he has been deprived by the illegal ouster. *McIntosh v. Neally*, 269.

MARRIED WOMEN.

1. HOMESTEAD — EQUITABLE RELIEF AGAINST DEFECTIVE CONVEYANCE OR, DENIED. — The officer's certificate of the wife's acknowledgment to a conveyance of the homestead by husband and wife is substantially defective in omitting to certify her examination and acknowledgment in the mode required by the statute, and the conveyance will not be reformed in equity on the ground that the examination and acknowledgment were in fact properly made, but not shown by the certificate from ignorance or mistake on the part of the officer; nor, in such case, will the conveyance be specifically enforced as an executory contract to convey. *Cox v. Holcomb*, 79.
2. HOMESTEAD, ALIENATION OF — ACKNOWLEDGMENT. — Officer's certificate of acknowledgment, in substantial compliance with the statutory form, is as essential to a valid alienation of the homestead as the examination and acknowledgment of the wife required by the statute; and a substantial compliance must affirmatively appear from the certificate itself, which is the sole and exclusive evidence of the voluntary signature and assent of the wife. Parol evidence is inadmissible to supply deficiencies. *Id.*

See DEEDS, 2; HUSBAND AND WIFE.

MASTER AND SERVANT.

1. DUTY OF MASTER TO FURNISH SAFE TOOLS. — It is the servant's own fault if he undertakes to perform without sufficient skill, or applies less than the occasion requires. But a section-hand who complains of the bad condition of the tool with which he has to work, and is promised a better one, and is told to work with the defective tool until the others arrive, and, relying on such promise, he does so, and is injured by the use of the defective tool, he may recover for the damages resulting. His solicitation of employment in a certain line of work is not an assertion on his part that he can work with defective tools. *Southern etc. Ry Co. v. Croker*, 747.
2. EMPLOYERS ARE ANSWERABLE TO UNDER-SERVANTS for the negligence of superintendents and representatives acting within the scope of their employment, and who are given the control and management of a distinct department in which their duty is entirely that of direction and superintendence. *Denver etc. R. R. Co. v. Driecoll*, 243.

3. ONE IS NOT A FELLOW-SERVANT with men under his charge where he is superintending the work, has two foremen, and a number of men under him, whom he employs and discharges at pleasure, and has control of the cars, tools, and machinery. His employers are therefore answerable for his negligence in giving an order for the removal of a stick or brake, whereby a car on which men were riding became unmanageable and ran against another car and wounded the plaintiff. *Id.*
 4. CONTRACT OF EMPLOYMENT WITH TERM OF SERVICE AT DISCRETION. — When in a contract of employment the term of service is left to the discretion of either party, or the term is left indefinite, or determinable by either party, then either party may put an end to it at will, and in such case it is no breach of contract to refuse to receive further services, and the refusal to accept any at all will entitle the employee to nominal damages only. *East Line etc. R. R. Co. v. Scott*, 758.
 5. CONTRACT OF EMPLOYMENT FOR WHATEVER LENGTH OF TIME EMPLOYEE MAY DESIRE TO SERVE. — A contract whereby an employer, for a sufficient consideration, agrees to employ another for whatever length of time the latter may desire to serve, entitles the employee to fix the period of his service when he presents himself for work and demands employment, and he may recover damages for a breach of contract if he is not furnished with employment for the time thus fixed. The original contract becomes certain when the term of service is so fixed, and is not within the statute of frauds. *Id.*
- See CONTRACTS, 4; MUNICIPAL CORPORATIONS, 31; RAILROAD COMPANIES.

MERGER OF ESTATES.

See ESTATES.

MORTGAGES.

1. POWER OF SALE GIVEN IN A MORTGAGE TO A MORTGAGEE IS VALID, but the court will closely scrutinize sales made thereunder. *Johnson v. Johnson*, 636.
2. MORTGAGEE GIVING POWER TO THE MORTGAGEE TO SELL THE MORTGAGED PREMISES DOES NOT CONVEY to him legal title thereto. The title remains in the mortgagor, and any sale or conveyance thereof must be in his name. *Id.*
3. POWER OF SALE GIVEN IN A MORTGAGE IS, IN SOUTH CAROLINA, REVOKED BY THE DEATH OF THE MORTGAGOR, because in that state a mortgagor retains the legal title, and the mortgagee therefore has not a power coupled with an interest. *Id.*
4. ALTERATION OF A NOTE SECURED BY MORTGAGE, WHILE IT AVOIDS SUCH NOTE, DOES NOT AFFECT THE MORTGAGE, and the latter may be enforced to compel payment of the debt for which the note was given. *Smith v. Smith*, 633.
5. RELEASE OF FORGED MORTGAGE — CLAIM FOR REIMBURSEMENT. — Where a loan is secured on a forged mortgage, and afterwards, by a second forgery, another loan is secured on the same property, whereupon, by direction of the mortgagor, the second mortgagee pays the first mortgagee the amount due on the first mortgage, which is surrendered and canceled, the second mortgagee cannot recover the money paid upon discovering the true facts, though both mortgagees were innocent of the forgeries. *Walker v. Conant*, 391.

6. **PURCHASE BY MORTGAGEE AT SALE UNDER POWER.** — Mortgagee who purchases at a sale made under a power to sell in the mortgage, the instrument not authorizing him to become the purchaser, thereby arms the mortgagor with the option, if expressed in a reasonable time, to affirm or disaffirm the sale, and this, without reference to the fairness of the sale or the fullness of the price. But the mortgage may expressly confer authority to purchase upon the mortgagee, and if he then becomes the purchaser, the mortgagor cannot disaffirm the sale, and be allowed to redeem, without alleging and proving facts which would generally invalidate a purchase by any one else under the same circumstances. *Knox v. Armistead*, 65.

See CHATTEL MORTGAGES; FIXTURES, 4, 5.

MUNICIPAL CORPORATIONS.

1. **THE STATUTORY LIABILITY OF MUNICIPAL CORPORATIONS** depends upon the true interpretation of the statute creating it. *Dundas v. City of Lansing*, 457.
2. **STATUTES — AMENDMENT OF CITY CHARTER IS A LOCAL LEGISLATIVE QUESTION** which may be submitted by the senate and house, either to the voters of the city or to the city council for decision. *Attorney-General v. Shepard*, 576.
3. **ENACTMENT OF ORDINANCE — VOTE OF LESS THAN QUORUM.** — In the absence of express regulation to the contrary, a proposition is carried at a meeting of a board of aldermen by a majority of the votes cast, when the journal properly shows the presence of a quorum at the meeting, and it is not necessary that a quorum should vote. *Id.*
4. **POWER OF CITY COUNCIL TO PERMIT REMOVAL OF WOODEN BUILDING WITHIN FIRE LIMITS.** — The council of a city of the second class has power to permit the removal of a wooden building from one point within the fire limits to another point within such limits; and a mere volunteer who will sustain no special injury from such removal cannot complain. *State v. City of Kearney*, 493.
5. **MAYOR OF CITY OF FIRST CLASS HAS NO AUTHORITY**, in the absence of a statute or city ordinance conferring the power, either to remove or suspend the city engineer from his office and duties. *Meteker v. Neally*, 269.
6. **UNDER THE CHARTER OF THE CITY OF ANDERSON**, an offender against a municipal ordinance has no right to demand a trial by jury before the mayor in the first instance. *City Council v. O'Donnell*, 728.
7. **STATUTES — CONSTRUCTION.** — Where a statute provides that "in all cases appealed to the city council the mayor shall preside, and the aldermen shall sit as a jury to try the facts involved, and may also reverse, modify, or affirm any or all of the rulings of the mayor in the first trial of the case," an appellant has a right to a trial *de novo* before the full council. *Id.*
8. **ACTION OF TOWN UPON QUESTION OF GRANTING AID TO BUILD RAILROAD.** — Under an article in the warrant for a town-meeting "to see what sum of money the town will vote to raise and appropriate as a gratuity" to a railroad company, to build a railroad, "said road to be completed on or before" a day specified, the town may lawfully vote a gratuity upon condition that the road "be completed in a reasonable time." *Sawyer v. Manchester etc. R. R. Co.*, 541.

9. CITY IS NOT LIABLE IN DAMAGES for the willful refusal of its common council to approve a statutory liquor bond, in the absence of a valid contract creating, or a statute declaring, a liability therefor. *Amperes v. City of Kalamazoo*, 432.
10. ORDINANCE IN RESTRAINT OF TRADE. — An ordinance the effect of which is to deprive the producers of market articles of their own raising from selling their produce at first hands to consumers in the principal city market, and to compel them to be sold by holders of stalls at second hand, driving the producers away from the chief market to remote places, is unreasonable, in restraint of trade, and void. *Hughes v. Recorder's Court*, 475.
11. ORDINANCE REGULATING TRADE. — The right of property or business cannot be invaded under the guise of police regulations for the benefit of the public health or good order, when it is manifest that such is not the object or purpose of the enactment or ordinance. *Chaddock v. Day*, 468.
12. ORDINANCE IN RESTRAINT OF TRADE. — An ordinance prohibiting the sale of fresh meat on the street in less quantities than one quarter of an animal, without first paying a license fee of ten dollars per month, is excessive, unreasonable, in restraint of trade, and void. *Id.*
13. TOWNS — CONCLUSIVENESS OF RECORD. — The record made by the town clerk is conclusive of the facts therein stated, not only upon the town, but upon all the world, so long as it stands as the record. It is the only competent evidence of a vote of the town; and it cannot be amended according to the truth, to the destruction of rights acquired by one relying upon it in good faith, without notice of the error. *Sawyer v. Manchester etc. R. R. Co.*, 541.
14. AMENDMENTS OF RECORD WHICH AFFECT VESTED RIGHTS OF THIRD PARTIES, or where injustice will be done to any one, cannot properly be allowed; and no reason exists for exempting towns from the operation of this rule. *Id.*
15. MUNICIPALITY CANNOT BE MADE LIABLE, in the absence of a statute giving the remedy, for an injury arising from a negligent use of its property, from which it receives, in its corporate capacity, no special benefit, or from a negligent use of its property by its officers, not acting as agents or servants of the corporation, but as public officers whose duties are defined by general law. *Edgerly v. Concord*, 533.
16. LIABILITY FOR NEGLIGENCE OF DUTY IN RESPECT TO USE OF WATER FROM HYDRANTS. — A city owned water-works constructed under a legislative charter for supplying water to the inhabitants, and for extinguishing fires. The management of the works was under the control of a board of water commissioners, and hydrants designed for use in extinguishing fires were under the control of the public fire department. In order to determine upon a suitable location for an engine-house for a steam fire-engine, the firemen, at the request of the mayor, and in his presence and that of the city councils, tested the capacity of a hydrant. A person traveling upon the street at the time was injured by reason of his horse taking fright at the stream of water thrown from the hydrant. In an action against the city, claiming damages for the injury, it was held that the plaintiff could not recover, in the absence of a statute giving the remedy. *Id.*
17. CITY IS NOT LIABLE TO PERSONAL ACTION for injuries resulting from the enforcement of the public laws affecting the state at large. *Le Olaf v. City of Concordia*, 285.

18. CITY IS NOT LIABLE IN DAMAGES to a person who was confined in the city prison upon a conviction for disturbing the peace and quiet of the city, and who sustained injuries by reason of the bad condition of the prison or the negligence of the officer in charge thereof. *Id.*
19. LIABILITY FOR PRIVATE TORT. — Whether a municipal corporation can be held liable for a tort committed by its authority, by reason of some malfeasance or misfeasance in the performance of a private duty, *quære. Chapman v. City etc. of Charleston*, 681.
20. MUNICIPAL CORPORATIONS CANNOT BE HELD LIABLE for the value of certain certificates of stock transferred in a manner different from that agreed upon in such certificates. The remedy, if any exists, is by action *ex contractu*. *Id.*
21. MUNICIPAL CORPORATION IS LIABLE FOR AN ILLEGAL TRANSFER of shares of stock by its officers or agents acting within the scope of their authority. *Id.*
22. MUNICIPAL CORPORATION CANNOT BE HELD LIABLE FOR DAMAGES, caused by the non-repair of the cross-walk at a certain street, by showing that sidewalks in that vicinity were out of repair. *Dundas v. City of Lansing*, 457.
23. CONTRIBUTORY NEGLIGENCE, when a person is injured through a defect in the street or sidewalk of which he had previous knowledge, is generally a question for the jury. *Id.*
24. CONTRIBUTORY NEGLIGENCE. — In an action against a city for injury through a defect in a sidewalk prepared and provided for the use of pedestrians, when the accident happened in the night-time, and while plaintiff was pursuing the ordinary traveled way, the question of his negligence is one of fact for the jury to determine. *Id.*
25. EVIDENCE. — IN ACTION AGAINST A CITY for injury through a defective sidewalk, after plaintiff has testified in her own behalf, her counsel cannot introduce evidence to show that her memory had become weakened, and thus form a basis for argument that she was mistaken in her testimony, and exercised due care and prudence. *Id.*
26. NOTICE OF DEFECT IN SIDEWALK. — Where a municipal corporation can acquire no knowledge of defective streets or sidewalks except through its aldermen, city marshal, or street inspectors, knowledge of or notice to any such agents of such defect is notice to the corporation after a meeting of the common council composed of such officers, and attended by one of them, having such notice or knowledge. *Id.*
27. LIABILITY FOR DEFECTIVE SIDEWALK. — In order to make a city liable for injury received through a defective sidewalk, it must be shown that it had notice of the particular defect complained of, and not of other defects which did not cause the injury alleged. *Id.*
28. LIABILITY FOR DEFECTIVE SIDEWALK — EVIDENCE. — In an action against a city for injuries received through a defective sidewalk, evidence which has no tendency to show that the city had actual notice of the defect complained of, and too remote and indefinite to prove that the particular defect had existed such length of time that notice might be presumed or inferred, is inadmissible. *Id.*
29. KNOWLEDGE OF OFFICERS IS KNOWLEDGE OF CORPORATION. — The individual knowledge of officers or agents of a municipal corporation who in such capacity have powers or duties conferred upon them in reference to a given matter, is the knowledge of the corporation, and notice to such officers or agents is notice to the corporation so as to bind it. *Id.*

30. **LIABILITY OF CITY FOR INJURY RESULTING FROM DEFECTIVE SIDEWALKS.** — In a suit brought by a special policeman to recover damages against the city by which he was employed for injuries received by him by reason of a defective sidewalk, it will not be presumed that the plaintiff had the same or equal knowledge of the defect that the city had, when he testifies that he did not know of the defect; and a verdict in his favor will not be set aside as against a charge that if the jury find that the plaintiff was in the employ of the defendant, and had the same or equal means of knowing the condition of the sidewalk, where he was injured, as did the defendant, and if the defect was patent, they should find for the defendant. *Galveston v. Hemmis*, 828.
31. **POLICEMAN DOES NOT ASSUME RISKS INCIDENT TO DEFECTIVE SIDEWALKS** and highways in the city in which he is employed, and does not stand in the same relation to the city that employees of private corporations do to their employers, and is not subject to the restricted rights of such relation. *Id.*
- See **CRIMINAL LAW**, 1; **EMINENT DOMAIN**; **RAILROAD COMPANIES**, 6, 7.

NEGLIGENCE.

1. **OWNER OF GROWING CROPS DESTROYED BY FAULT OF ANOTHER MAY RECOVER** the value thereof in an action against the person through whose negligence they were destroyed. *Fremont etc. R'y Co. v. Marley*, 482.
2. **OWNER OF CATTLE IS NOT BOUND TO PLACE THEM ON POOR MARKET**, when, in his judgment, the market was likely to improve in a short time. He has a right to exercise his own judgment and discretion in the matter. And if the cattle are subsequently injured through the negligence of another, the latter will be liable for such injury, provided the owner did not allow injury to result to them from any other cause which he could have avoided. *McCluneghan v. Omaha etc. R. R. Co.*, 508.
3. **CONCURRING NEGLIGENT ACTS — EVIDENCE.** — In an action for damages for personal injury, where the accident and resulting injury are alleged as having been caused by several concurring negligent acts and omissions of defendant, it is necessary to prove each element of negligence alleged, in order to recover. *Wormsdorf v. Detroit City R'y Co.*, 453.
4. **EVIDENCE THAT PREVIOUS ACCIDENTS** had happened at the same turn-table at which plaintiff's son was injured is not admissible in an action to recover for damages for injuries sustained by such son from a turn-table, unless defendant is shown to have had knowledge of such accidents. *Bridger v. Asherville etc. R. R. Co.*, 653.
5. **EVIDENCE AS TO WHETHER PLAINTIFF THOUGHT IT POSSIBLE** that his child could have visited a turn-table without his knowledge is properly rejected in an action to recover damages for injuries to one of the plaintiff's children from an unguarded turn-table. *Id.*
6. **EVIDENCE. — CUSTOM OF WELL-REGULATED RAILROADS IN REFERENCE TO LOOKING AND GUARDING THEIR TURN-TABLES** may be received in evidence in an action for injuries occasioned by leaving a turn-table unguarded, especially if the plaintiff had undertaken to prove that one railroad did in fact lock its turn-table. *Id.*
7. **ELEVATORS, WARNING GIVEN TO OWNERS OF.** — **EVIDENCE** in an action to recover for injuries received for an elevator accident may be received to show that the defendants had been told that they were operating the elevator carelessly and were not exercising more care, because it tends

- to establish that the defendants knew that they were operating it carelessly and incautiously. *Treadwell v. Whittier*, 175.
8. **BURDEN OF PROOF.** — When plaintiff shows that he has been injured by the breaking of machinery which was under the control and management of the defendant, he makes out a case which entitles him, if not rebutted, to recover from the defendant. The burden is then thrown on the defendant to show that he was not guilty of negligence for which he must be charged. *Id.*
 9. **NOTICE TO BRAKEMAN OF DANGER FROM LOW BRIDGE — CONTRIBUTORY NEGLIGENCE.** — When a brakeman employed by a railroad company is placed on a train running on a road with which he is not familiar, and such train has to pass under a low bridge or bridges, which, though not high enough to allow him to pass in an erect position on top of a car, is yet high enough to meet legal requirements, it is the duty of the company to warn or notify him of the danger he is to encounter, and failure to do so is negligence, for which the company would be liable. But if he has been sufficiently warned or notified of the danger, and from inattention, indifference, absent-mindedness, or forgetfulness, he fails to inform himself, or to take the necessary steps to avoid the injury, he is guilty of such contributory negligence as will defeat a recovery. *Louisville etc. R. R. Co. v. Hall*, 84.
 10. **CONTRIBUTORY NEGLIGENCE.** — Where a plaintiff testifies that he exercised care to avoid the injury complained of, a verdict in his favor will not be set aside on the ground that such injury was the result of his own want of care. *Galveston v. Hemmis*, 828.
 11. **CONTRIBUTORY NEGLIGENCE — EVIDENCE AS TO CAUTION, PRUDENCE, RECKLESSNESS, OR IMPETUOSITY OF A BOY IS INADMISSIBLE TO EXCUSE HIS CONTRIBUTORY NEGLIGENCE.** *Bridger v. Asheville etc. R. R. Co.*, 653.
 12. **CONTRIBUTORY NEGLIGENCE, WHEN PLEADED ALONE, IS AN ADMISSION OF NEGLIGENCE ON THE PART OF THE DEFENDANT; BUT WHEN IT IS INTERPOSED WITH THE PLEA OF NOT GUILTY, THE EFFECT OF THE DOUBLE DEFENSE IS, THAT ALL NEGLIGENCE ON THE PART OF THE DEFENDANT IS DENIED, AND THE BURDEN OF PROOF IS THROWN ON THE PLAINTIFF.** *Louisville etc. R. R. Co. v. Hall*, 84.
 13. **NEGLECT QUESTION FOR JURY.** — Where damages are claimed for an injury caused by falling into a hole near a recognized way, used by people in going to and coming from a railway depot, the questions of the proximity of the hole to the traveled way, and whether the plaintiff was negligent in falling into it, are for the jury. *Cross v. Lake Shore etc. R'y Co.*, 399.
 14. **QUESTION FOR JURY. — WHETHER A CHILD'S CAPACITY WAS SUCH THAT HE MIGHT BE CHARGEABLE WITH CONTRIBUTORY NEGLIGENCE** is properly left to the jury, when he was not so young as to require the judge to say that he could not contribute to his injury, nor so old that the presumption must exist, in the absence of evidence to the contrary, that he must suffer the consequences of his own neglect. *Bridger v. Asheville etc. R. R. Co.*, 653.
 15. **SUBMISSION OF QUESTION OF TO JURY.** — Where, upon the testimony introduced in the case, the court submits to the jury the question of the plaintiff's contributory negligence, and the jury, by their verdict, find upon this question in favor of the plaintiff, the appellate court cannot, upon the evidence, which is greatly conflicting, as a matter of law, declare that the plaintiff was guilty of contributory negligence that

would defeat his right of recovery. *Kansas City etc. R. R. Co. v. Kier*, 311.

See BANKS AND BANKING, 2, 3; CARRIERS, 9; EVIDENCE, 5; MUNICIPAL CORPORATIONS; RAILROAD COMPANIES.

NEGOTIABLE INSTRUMENTS.

1. A WRITTEN PROMISE TO PAY a certain sum on a certain day, "and attorney's fees," is not a negotiable promissory note. *Altman v. Ritter-shofer*, 341.
2. THE CERTAINTY REQUISITE TO THE NEGOTIABILITY of an instrument must continue until the obligation is discharged, and any provision which, before that time, removes such certainty prevents the instrument being negotiable at all. *Id.*
3. NEGOTIABLE PROMISSORY NOTE IS VALUABLE CONSIDERATION in a sale of land. *Weaver v. Nugent*, 792.
4. SET-OFF. — BY EXPRESS PROVISION OF ALABAMA CODE, SECTION 2684, commercial paper negotiated for value before maturity is not subject to set-off or recoupment. *Manning v. Maroney*, 67.
5. NOTE — PURCHASER BEFORE MATURITY — ESTOPPEL. — Where the maker of a note says to a purchaser before maturity that the note is all right, and that he will pay it when due, he is estopped from asserting failure of consideration, or pleading any other invalidity against the note, if the purchaser relied upon his statement. *Sutton v. Beckwith*, 344.
6. NOTE — CONTEMPORANEOUS AGREEMENT — RIGHT OF PURCHASER BEFORE MATURITY. — An agreement made at the time of the execution of a note, forming its real consideration, and to be performed before its maturity, is a part of the same contract, and, between the original parties to the note, cannot be enforced until the agreement is performed; and a purchaser of such note before maturity, and before the time of performance of the agreement, with notice and knowledge of its relation to the note, is bound by it the same as if it were attached to the note or written upon the same piece of paper. *Id.*
7. FALSE REPRESENTATION by the payee of a note to the maker that a certain association on whose behalf he executed a bond, forming the consideration for the note, was duly incorporated under the statute, is a material representation, and if acted upon by the maker as an inducement in executing the note, avoids it in the hands of the payee, or in the hands of a purchaser before maturity with notice. *McNamara v. Gargett*, 355.
8. IF DRAWER OF BILL COUNTERMANDS INSTRUCTIONS to the drawee to pay it, he thereby dispenses with the necessity of protest and notice of dishonor to himself. *Manning v. Maroney*, 67.
9. PLEADING — WHEN PLEA VERIFIED BY AFFIDAVIT IS NECESSARY. — The complaint in an action by an indorsee against the drawer of a bill of exchange averred the instrument to be the property of the plaintiff, transferred to him by the indorsement of the payee, and there was no sworn plea (Ala. Code, secs. 2676, 2770) denying the fact of ownership. In such case the validity of the transfer could not be questioned, and the bill was properly admissible in evidence. *Id.*
10. PLEADING — EVIDENCE. — IT IS LONG-SETTLED RULE OF PLEADING AND EVIDENCE that facts which excuse demand and notice will, in law, be deemed proof of such demand and notice. Allegation of demand and notice may, therefore, be proved by any facts showing a waiver of them. *Id.*

11. EVIDENCE — ADMISSIBILITY IN, OF BILL OF EXCHANGE. — Bill of exchange is admissible as evidence in an action thereon without preliminary proof of demand, protest, and notice of dishonor, or a waiver of them, these facts being mere matter of defense; and the fact that it was mutilated, because of identifying words written on it by the commissioner, when it was attached as an exhibit to a deposition, does not render it inadmissible as evidence. *Id.*
 12. EVIDENCE. — In an action on a note purchased before maturity, with knowledge that the true consideration is an agreement by a certain association to sell a certain amount of oats before the note should be payable, evidence that the maker of the note took initiatory steps toward joining another association of the same kind is irrelevant, and should be rejected. *Sutton v. Beckwith*, 344.
- See CONTRACTS, 10; GUARANTY; INFANTS AND INFANCY, 1-3; MORTGAGES, 4.

NEW TRIAL.

1. NEW TRIAL SHOULD BE GRANTED OR REFUSED WITHOUT REGARD TO FINANCIAL CONDITION of the parties, or to the facilities for appealing possessed by either of them. *Galveston v. Hemmis*, 828.
2. ON MOTION FOR A NEW TRIAL, EVIDENCE WILL NOT BE RECEIVED TO SHOW THAT A JUROR HAD FORMED AN OPINION before hearing the case. *Bridger v. Asheville etc. R. R. Co.*, 653.

NOTICE.

1. RECORD OF AN AGREEMENT BETWEEN A WATER COMPANY AND THE LAND-OWNER, ACKNOWLEDGED BY THE LATTER ONLY, whereby the former agreed to supply and the latter to pay for water to be furnished on such land, is notice of the contents of the agreement to all subsequent purchasers. *Fresno Canal Co. v. Rowell*, 112.
 2. NOTICE OF TERMS OF AN AGREEMENT WHEREBY A WATER COMPANY HAD STIPULATED TO FURNISH AND THE LAND-OWNER TO PAY FOR WATER for irrigating land for a specified time will be imputed to a subsequent purchaser of such land, who, at the time of his purchase, knew that there was a water right connected with the land, and made no inquiry as to its terms. This knowledge made further inquiry a duty, and the failure to pursue such duty cannot relieve him from the obligation which proper inquiry would have revealed. *Id.*
- See ASSIGNMENTS; CHATTEL MORTGAGES; CORPORATIONS, 11; EQUITY, 11; EVIDENCE, 3; FRAUDULENT CONVEYANCES, 6; LIS PENDENS; MUNICIPAL CORPORATIONS, 26-29; NEGLIGENCE, 9; REGISTRATION.

NUISANCES.

1. MALICIOUS ANNOYANCE OF NEIGHBORS IS RESTRAINABLE NUISANCE WHEN. — When acts are done for the malicious or willful purpose of annoying a neighbor, and they have that effect, and make his home uncomfortable, the doing thereof amounts to a private nuisance which a court of equity will restrain, although the doing thereof might not, under other circumstances, amount to a nuisance. *Medford v. Lery*, 887.
2. COURT OF EQUITY IS DISINCLINED TO INTERFERE IN MERE DOMESTIC BROILS; and where trouble arises between two families occupying rooms in the same house, and using the halls and stairways in common, the court will not restrain one of them from committing a nuisance against the other,

unless the proof of the existence of the nuisance is clear and strong. It will not interfere if it appears that both parties are in fault. *Id.*

2. **DAMAGES FOR NUISANCE.** — **IF TRESPASSES AND NUISANCES ARE NOT OF A PERMANENT CHARACTER**, damages can be recovered only for the injury sustained up to the time of the commencement of the action; but as to trespasses and nuisances that are of a permanent character, a single recovery may be had for the whole damages resulting from the act. *Denver City etc. Co. v. Middaugh*, 234.

OFFICE AND OFFICERS.

1. **POWER OF APPOINTMENT TO OFFICE IS NOT ESSENTIALLY AN EXECUTIVE FUNCTION.** It may, therefore, be regulated by law, and if the law so provides, may be exercised by the members of the legislature. Hence, a statute authorizing an election of trustees of a state library by the legislature in joint convention assembled is constitutional. *People v. Freeman*, 122.
2. **SHERIFFS—LIABILITY OF SURETIES ON OFFICIAL BONDS OF.** — A sheriff sold real estate on an order of sale, but failed to collect all the purchase-money, and made his return. Before confirmation of the sale his term of office expired, and he was re-elected to the office, and the sale was then confirmed, and the property conveyed to the purchaser. In an action against the sheriff and the sureties on his official bond for his second term, it was held that the sureties were not liable for the money which the sheriff failed to collect at such sale, which was during his first term of office, but that the sheriff himself was liable therefor independently of such bonds. *Studebaker v. Johnson*, 287.

See MANDAMUS 2.

OFFICIAL BONDS.

See BONDS· OFFICE AND OFFICERS 2.

PAROL EVIDENCE.

See AGENCY, 2, 4, 5, 8; EVIDENCE, 9-11; MARRIED WOMEN, 2.

PARTITION.

See CO-TENANCY.

PARTNERSHIP.

1. **SERVICE OF SUMMONS ON MANAGING MEMBER OF PARTNERSHIP**, where one of the members of the firm is absent from the state, is sufficient to sustain a judgment against the property of the firm. *Winters v. Means*, 489.
2. **SUIT MAY BE MAINTAINED IN NAME OF PARTNERSHIP WHICH HAS BEEN DISSOLVED**, it being sufficient to describe it as a late partnership, and setting out the names of the late partners. *Tompkins v. Levy*, 31.
2. **SET-OFF — PARTNERSHIP DEMAND AGAINST INDIVIDUAL CLAIM.** — In an action on a bill of exchange brought by an indorsee against the drawer, a demand due from the payee to a partnership of which the defendant is a member, if available as a set-off in any case, is not so available unless it is made to appear that the other partners gave their consent to such use of the claim before the assignment of it to the defendant, and that the plaintiff had knowledge of their consent. The consent given at the trial

cannot be made to relate back to the date of the assignment, so as to make the set-off good. *Manning v. Maroney*, 67.

4. REMEDY. — RETURN OF NULLA BONA on a judgment against one of two or more partners for partnership debts is sufficient evidence of inability to secure payment as to him, and authorizes a resort to equity to reach property fraudulently disposed of by him. The other partners need not first be proceeded against at law. *Bates v. Cobb*, 742.

See AGENCY, 16; PLEADING, 8.

PARTY-WALLS

1. OWNERSHIP, AND RIGHT TO INCREASE HEIGHT OF. — When a party-wall is erected, one half on the land of each adjoining proprietor, they do not own it as tenants in common, but each is the owner in severalty of his half, with an easement of support in his neighbor's half; and each may increase the height of his half of the wall, at least, if not of the entire party-wall, when it can be done without damage to the other proprietor. *Graves v. Smith*, 60.
2. PARTY-WALL MUST ORDINARILY BE CONSTRUED TO MEAN A SOLID WALL, without windows or openings; and in the absence of statutory regulation, or express agreement between the parties, neither has the right to make windows or openings in the wall; and such right is not conferred by an agreement giving either one the right "to use said party-wall free of expense in the erection of any building which he may wish to erect on said lot." *Id.*
3. ONE PART OWNER OF PARTY-WALL MAY BE ENJOINED, at the suit of the other, from making windows or other openings in the wall. *Id.*

PAYMENT.

1. PRESUMPTION THAT DEBT IS PAID after the lapse of twenty years is a disputable one. *Barber v. Jones*, 586.
2. MONEY RECEIVED IN GOOD FAITH, and in the ordinary course of business, for valuable consideration, cannot be recovered because it was fraudulently obtained of some other person by the payor. *Walker v. Conant*, 391.
3. PAYMENT OF TAXES IN ADVANCE, under no stress of process, is a voluntary payment, and cannot be recovered without statutory permission. *Cox v. Welcher*, 339.
4. INVOLUNTARY PAYMENT OF TAXES or other claim made under legal duress does not require a specific protest before recovery can be had. *Id.*
5. ATTEMPT TO COMPEL PAYMENT, where there is no legal burden, is a legal injury; and payment made to avoid the seizure and sale of property to pay the wrongful claim can be recovered as an extorted sum for which there was no consideration. *Id.*

PERJURY.

See CRIMINAL LAW, 26 27.

PERSONAL INJURIES.

See NEGLIGENCE.

PERSONAL PROPERTY.

See FIXTURES, 6.

PLEADING.

1. **PLEADING NEED NOT ALLEGE WHAT COURT IS PRESUMED TO KNOW.**
Weaver v. Nugent, 792.
2. **STATEMENT OF FACTS FILED IN SUPPORT OF DECLARATION** is to be considered as a part of the declaration; and it is proper practice to test by demurrer the sufficiency of the cause of action alleged in such statement and declaration. *Deits v. Insurance Company*, 909.
3. **COMPLAINT IN ACTION** calling for an account for the value of stock illegally transferred is not open to demurrer, as failing to state facts sufficient to constitute a cause of action in omitting to give a specific description of the stock, and demand for its retransfer. *Chapman v. City etc. of Charleston*, 681.
4. **WANT OF SUFFICIENT DISTINCTNESS** in the complaint, in referring to the plaintiffs, should be taken advantage of by motion to make the allegations in the complaint more specific and definite, and not by demurrer. *Id.*
5. **PETITION IS DEFECTIVE AND INSUFFICIENT** which fails to describe who is plaintiff and who defendant, either in the title or elsewhere, except as it may appear from the order or position in which the names are placed in the heading, and which omits to name the pleading by inserting the word "petition" after the title of the cause, as positively required by the Kansas code. *Wilhite v. Williams*, 281.
6. **ALTERNATIVE PLEADING, PERMISSIBLE WHEN.** — When a suit is against a firm and an individual whose true relation to the firm, either as agent or a member of the firm, is not definitely known to any one but themselves, the plaintiff may allege that such individual was either an agent or a member of the firm, when the liability would be the same either way. *Floyd v. Patterson*, 787.
7. **SUSTAINING DEMURRER TO SPECIAL PLEA, IF ERROR AT ALL**, is error without injury when the same defense is equally available under the general issue, which was also pleaded. *Manning v. Maroney*, 67.
8. **SUSTAINING DEMURRER TO SPECIAL PLEA, IF ERRONEOUS AT ALL**, is error without injury, where, as the record shows, the defendant had the benefit of the same defense under another special plea. *Louisville etc. R. R. Co. v. Hall*, 84.
9. **DEMURRER TO PLEADING IN WHICH EXECUTION OF DEED IS ALLEGED** ADMITS the execution of the instrument, and no question as to the sufficiency of the certificate of acknowledgment is raised. *Munger v. Baldridge*, 273.
10. **DEFECT OR MISJOINDER OF PARTIES** appearing upon the face of the complaint is a ground of demurrer, and when not appearing on the face of the complaint, objection thereto may be taken by answer. If no such objection be taken, either by answer or demurrer, it is waived. Therefore the question of defect of parties defendant cannot be raised for the first time in the appellate court, when it appears that the persons who ought to have been made defendant are not indispensable parties, and that a decree can be entered between the parties to the action without them. *Great West Min. Co. v. Woodmas etc. Min. Co.*, 204.
11. **DEMURRER TO BILL FILED IN DOUBLE ASPECT.** — Objection to a bill filed in a double aspect to set aside a sale of lands under a probate decree, upon the ground, — 1. Of fraud; or 2. That the proceedings are void on their face, — can only be taken by demurrer specially assigned. *Tulman v. Thomas*, 42.

12. **IN ACTION TO ENJOIN JUDGMENT, NATURE OF DEFENSE IN THE ORIGINAL ACTION MUST BE PLEADED.** — In an action to enjoin a judgment, it is not sufficient for the plaintiff to allege that he has a defense to the action in which the judgment was rendered, but he must state the general nature of his defense, so that the court can judge of its sufficiency. *Winters v. Means*, 489.
13. **MOTION IN ARREST OF JUDGMENT MUST BE BASED UPON SOME DEFECT APPEARING UPON THE RECORD**, and cannot be sustained merely upon the ground that the allegations of the indictment are not supported by the proof. Where the indictment could have been sustained under proof, there is no ground for arrest of judgment. *State v. Syphrett*, 616.
14. **AMENDMENT ADDING NEW PARTY AS TO WHOM ACTION IS BARRED.** — Where a judgment is reversed and the cause remanded because a person who should have been made a party plaintiff was not made a party, and after the action is barred as to such person he is made a party plaintiff by amending the petition, and the defendant then demurs to the amended petition on the ground that the action is barred by the statute of limitations, the demurrer should be sustained as to the new party; but the making of the new party does not set up a new cause of action, and the defendant, having pleaded the statute as to such new party, can no longer complain that he is not a party. *East Line etc. Ry Co. v. Culbertson*, 805.
- See AGENCY, 4; CORPORATIONS, 15; DAMAGES, 2, 3; EQUITY, 7; FRAUD, 1; FRAUDULENT CONVEYANCES, 7; LIBEL AND SLANDER, 1, 2; MALICIOUS PROSECUTION, 1-6; NEGOTIABLE INSTRUMENTS, 9, 10; RAILROAD COMPANIES, 3; REFLEVIN, 1.

POWERS OF ATTORNEY.

See AGENCY, 12-14; HUSBAND AND WIFE, 2.

POWERS OF SALE.

See MORTGAGES, 1-3.

PRESCRIPTION.

DECISIONS RECOGNIZING DOCTRINE OF PRESUMPTION BY PRESCRIPTION BASED ON LAPSE OF TWENTY YEARS OF TIME are founded upon the principle of some laches on the part of one who, having the right and capacity to sue either at law or in equity, neglects or omits to do so for such period of twenty years. For the repose of society, it is presumed that the right, if it existed, has in some manner been lost by reason of such act of acquiescence, based on some omission or neglect. *Woodstock Iron Co. v. Fullenwider*, 73.

PROCESS.

1. **DUE PROCESS OF LAW.** — No person can be prejudiced, or his right or person or property affected, without notice, actual or constructive. Any proceeding which violates this principle is not due process of law, and is not according to the law of the land. *Great West Min. Co. v. Woodmas etc. Min. Co.*, 204.
2. **SERVICE OF SUMMONS, TO BIND A CORPORATION DEFENDANT,** must be upon its general agent. *Id.*

3. **SERVICE OF SUMMONS UPON THE FOREMAN OF A CORPORATION IS INVALID** where there is a general agent by whom such foreman was employed, and where the duties of the foreman were to oversee the laborers in a mine, keep their time, see that their work was done in mining fashion, and perform the duties of mine-boss, and, in the absence of the general agent, to sell ores, buy supplies, pay wages, and report his acts and doings to the general agent. *Id.*
 4. **VOLUNTARY APPEARANCE WAIVES ALL OBJECTIONS TO A SUMMONS** and to the return thereof, and the filing of a demurrer or answer to the complaint constitutes such appearance. *Union Pacific etc. Co. v. De Busk*, 221.
 5. **WAIVER OF DEFECTS IN SERVICE OF SUMMONS.** — Though defendant attempts first by motion and then by plea to quash the service of summons, if on such motion and plea being determined against him he subsequently answers to the merits, such answer waives any pre-existing defects in such service. *Id.*
 6. **SHERIFF'S RETURNS, IMPEACHING.** — An officer's return may be impeached when the matters stated therein are not presumptively within his personal knowledge. Hence, where the return of service of process shows that it was served upon P., "the agent of the defendant company," "the resident agent of defendant company," the matters thus stated with respect to P.'s agency are not presumptively within the knowledge of the officer, and the return may be impeached by proving that P. was not the general agent of the defendant. *Great West Min. Co. v. Woodmas etc. Min. Co.*, 204.
- See ATTACHMENT AND GARNISHMENT, 2; ATTORNEY AND CLIENT, 4, 5; CORPORATIONS, 10; EXEMPTIONS, 1; MALICIOUS PROSECUTION, 9; PARTNERSHIP, 1.

PUBLIC LANDS.

1. **SWAMP-LAND ACT — STATE PATENT.** — The act of Congress of September 28, 1850, known as the swamp-land act, conveyed to each of the states respectively in fee all lands within the purview, and title thereto vested in the state from the date of such act; and the patent which afterwards issued for such land is only evidence of the grant, and not of the date on which the grant took effect. *Sterling v. Jackson*, 405.
2. **SWAMP-LAND ACT — RESERVATIONS FOR LIGHT-HOUSE PURPOSES.** — Reservations made by the commissioner of the general land-office, after the act of Congress of September 28, 1850, known as the swamp-land act, went into effect, from the lands granted by such act for light-house purposes, are null and void. *Id.*
3. **NAVIGABLE WATER — HUNTING RIGHTS.** — Where, at the time of the passage of the swamp-land act, by Congress, on September 28, 1850, there was a shore between such lands in Michigan and Lake Erie which separated such land from the lake, but since that time the waters from the lake have forced a way through such shore and converted such swamp-land into a bay, and such land, covered by navigable water, has been patented to the state, and by it patented to an individual, his title so acquired is subject only to the public right of navigation so long as he allows the bay to remain part of the lake, and he has the exclusive right to use the waters of such bay for the purpose of shooting wild fowl thereon. *Id.*
4. **HUNTING RIGHTS.** — The grant of swamp and overflowed lands under act of Congress of September 28, 1850, was effective to vest title to AM. ST. REP., VOL. XIII. — 62

submerged land, and a state patent passed such title as it had; and if, prior to its date, a portion of such land had become submerged by the slow and imperceptible encroachments of the waters of the Great Lakes, the state would still be the owner, and could grant the bed of the lake to its patentee, so as to invest him with the exclusive right of fowling thereon, so long as such grant did not interfere with private vested rights. *Id.*

See ANIMALS.

RAILROAD COMPANIES.

1. **RAILROAD BRIDGE OVER RIVER, DUTY OF COMPANY IN CONSTRUCTION OF.** — A railroad company having authority to build a bridge across a river is bound to so construct such bridge as to avoid injury to adjacent property owners, as well as to have regard to the permanence and safety of the bridge as a means for the transportation of persons and property over its line. If one class of bridge is permanent and safe, but its construction will necessarily impede the flow of water and ice that is known or is reasonably to be expected to pass in the stream, and another class would be safe, and would not impede the flow of water and ice, to the injury of such adjacent property owners, the latter class should be selected. *McCleneghan v. Omaha etc. R. R. Co.*, 508.
2. **REQUIREMENTS OF DUTY IN RESPECT TO CONSTRUCTION OF BRIDGES.** — When, in crossing a public highway, it becomes necessary for a railroad company to span it with a bridge, it is the duty of the company to place the structure at such an elevation as that trains, with their customary employees, can pass under it unharmed. But where inequality of surface or other hindrance, occurring naturally or in the proper construction or grade of the railroad track, renders such elevation impossible, or would greatly incommode the public in the use of the bridge, or greatly increase the expense to the company, it may be so constructed as to extend below the line of absolute safety; but in no case would it be permissible to so place the bridge that brakemen on top of the train, and while in the discharge of their duties, could not avoid danger by bending or stooping. *Louisville etc. R. R. Co. v. Hall*, 84.
3. **SUFFICIENCY OF COMPLAINT.** — The complaint in an action by a brakeman against a railroad company to recover for personal injuries caused by being struck by a bridge overhead across a public road, while on the top of a car in the discharge of his duties, is insufficient, if it fails to aver that the bridge in question was erected or maintained by the railroad company. *Id.*
4. **NEGLIGENCE — DUTY TO KEEP WAY IN REPAIR.** — It is the duty of a railway company to keep a recognized way to and from its depot in a reasonably safe condition for the passage of the public. *Cross v. Lake Shore etc. R'y Co.*, 399.
5. **NEGLIGENCE — DUTY TO KEEP PASSAGE-WAY IN REPAIR.** — Where a hole causing an injury is so near a recognized way, used by people coming and going to and from a railway depot, that a person traveling the way might, by making a false step, or by stumbling therefrom, fall into such hole, it is the duty of the railway company to keep it guarded, and a failure to do so makes the company liable for the injury, if proper care was exercised by the injured party. *Id.*
6. **NEGLIGENCE — LIABILITY FOR UNSAFE CONDITION OF RAILWAY STATION-GROUNDS.** — The plaintiff, an intending passenger on one of

the defendant's trains, purchased a ticket, and awaited the arrival of the train at the defendant's station. The train was delayed, and the plaintiff waited for its arrival until after dark. The station platform was about three feet from the ground, without artificial lights of any kind, and there were no water-closets or other like conveniences in or about the station-house. It became necessary for the plaintiff to retire from the station-house and from the platform, and in attempting to step from the platform to the ground, which she believed to be on the same level at the place where she made the attempt, she lost her balance, and fell, sustaining the injuries for which she brought this action. The jury found a verdict for the plaintiff, and against the defendant, for damages; and it was held that the questions as to whether the defendant was guilty of negligence, and whether the plaintiff was guilty of contributory negligence, were proper questions for the jury, and that their verdict upon these questions was conclusive; and also, that evidence tending to show that other persons had fallen from the same portion of the platform where the plaintiff fell, and under circumstances of a similar character, was properly admitted in evidence on the trial. *Missouri Pacific R'y Co. v. Neiswanger*, 304.

7. **SPEED OF RAILWAY TRAIN, CITY ORDINANCE LIMITING, ADMISSIBILITY OF.** In an action against a railway company to recover damages for the negligent killing of an animal while being driven over a public crossing in a city, the ordinance of the city limiting the speed of trains within the city limits to six miles an hour is competent evidence for the jury in passing upon the question of negligence. *Union Pac. R'y Co. v. Rasmussen*, 527.
8. **KILLING OF STOCK IS PRESUMED TO HAVE BEEN DONE THROUGH NEGLIGENCE** of a railway company, when the train by which the killing was done was at the time running through a city at a greater rate of speed than was permitted by the city ordinance, if it be shown that a train running at a less speed would not have caused the injury. *Id.*
9. **RAILROAD COMPANIES. — RAILROAD COMPANY IS LIABLE TO ANY ONE OF ITS SERVANTS OPERATING ITS ROAD** for the negligence of either one of its officers or servants whose duty it is to keep the road in a reasonably safe condition, and who culpably fails to perform such duty, or to give notice or warning thereof. *Kansas City etc. R. R. Co. v. Kier*, 311.
10. **RAILROAD COMPANIES — LIABILITY FOR INJURIES TO EMPLOYEE RESULTING FROM UNSAFE CONDITION OF ROAD-BED. —** The plaintiff was a brakeman in the employ of the defendant railroad company, and it was his duty to step from his train while it was moving slowly to open and adjust a certain switch. The ground about the switch had for a long time been level and hard, and was in that condition when the plaintiff's train passed that place in the morning; but before its return, after dark in the evening, the defendant company caused several car-loads of cinders to be dumped in heaps in and about the switch for ballast, leaving the ground soft and spongy. Without notice of the changed condition of the road-bed, the plaintiff stepped from his train in his usual and ordinary manner for the purpose of turning the switch, when his feet struck the cinders in such a way as to cause him to lose his balance and be thrown under the train, whereby his left foot was so crushed and mangled that amputation was necessary. In such case, in the absence of contributory negligence on the part of the plaintiff, the defendant company would be liable in damages for the injuries he sustained. *Id.*

11. **WHEN ESTABLISHED RULES OF RAILROAD COMPANY ARE TO BE DEEMED MODIFIED.** — Rules established by a railroad company relative to the duties of conductors and others in opening and adjusting switches on its road, with notice thereof to conductors and other employees, must govern until abrogated or changed. But such rules are deemed changed or modified as to a brakeman, who, in obedience to the orders of the conductor of his train, and in the presence and with the knowledge of the division superintendent, who has charge of the management of the road, and directs the employees of the company in the performance of their duties, opens and adjusts the switch for a long time in a different manner from that prescribed by the established rules. *Id.*
12. **RINGING BELL OR BLOWING WHISTLE AT CROSSING.** — The design of the statutory requirement that the conductor or engineer shall ring the bell or blow the locomotive-whistle, on approaching a public road crossing, is to warn and protect persons who are about to cross the track of the road; and it has no application to the case of a brakeman suing for personal injuries, caused by his being struck by the timbers of a bridge overhead while on top of one of the cars, in the discharge of his duty. *Louisville etc. R. R. Co. v. Hall*, 84.
13. **FAILURE OF RAILWAY COMPANY TO RING BELL AND SOUND WHISTLE before trains reach a public crossing, as required by statute, is a proper matter to be considered by the jury in determining the question of the company's negligence.** *Union Pac. R'y Co. v. Rasmussen*, 527.
14. **DUTY TO PROVIDE WARNING SIGNALS FOR PROTECTION OF EMPLOYEES.** — The question of duty and liability of a railroad company, in respect to the use of appliances to warn employees when approaching a public road crossing spanned by a bridge overhead, is to be determined by utility, and the usage and custom of well-regulated railroads. If the appliances are useless and hurtful, it cannot be negligence to reject them, and if many well-regulated railroads abstain from their use, the failure to use them is not of itself negligence; and their use by a majority of railroads does not necessarily require all railroads to adopt them, nor impute negligence for failure to do so. *Louisville etc. R. R. Co. v. Hall*, 84.
15. **LIABILITY OF RAILROAD COMPANIES FOR INJURIES BY FIRE.** — Provision of Vermont General Statutes, chapter 28, section 78, that "when any injury is done to a building or other property by fire communicated by a locomotive-engine of any railroad corporation, the said corporation shall be responsible in damages for such injury, unless they shall show that they have used all due caution and diligence, and employed suitable expedients to prevent such injury," enacts a more rigorous rule as to liability than that imposed by the common law, and excludes the defense of contributory negligence in cases arising under the statute. And the Vermont statute, thus construed, determines the liability of a railroad corporation in an action brought in New Hampshire to recover damages for injury to personal property by fire caused by sparks from the defendant's locomotive-engine in Vermont. *Laird v. Railroad*, 564.
16. **CONSTITUTIONALITY OF STATUTE IMPOSING LIABILITY FOR FIRE.** — A statute is constitutional which declares "that every railroad corporation operating its line of road or any part thereof in this state shall be liable for all damages by fire that is set out or caused by operating any such line or any part thereof, and such damages may be recovered by the

party damaged by a proper action in any court of competent jurisdiction." This statute is not penal, but remedial, and applies to corporations which have obtained their charters before as well as since its passage. *Union Pac. R'y Co. v. De Busk*, 221.

17. FIRE — RESPONSIBILITY FOR. — By the ancient common law, a person in whose house a fire originated, which afterwards spread to and destroyed his neighbor's property, was forced to make good the loss, whether the person in whose house the fire originated was negligent in respect to the fire or not; and subsequently it was held that such person would be held responsible for fire in his field as well as in his house, on the ground that a person who makes a fire must see that it does no harm. *Id.*
18. SUFFICIENCY OF EVIDENCE. — A JURY IS WARRANTED IN INFERRING THAT A FIRE WAS CAUSED BY A RAILWAY TRAIN of the defendants, when witnesses testified that the fire sprang up immediately upon the passing of such train, and that there was no fire on the premises before, and no apparent cause for fire. *Id.*
19. LIABILITY FOR NEGLIGENCE OF LESSEE. — Though a railroad corporation is authorized to lease its road, it does not by so doing exempt itself from liability for the value of cattle negligently killed by the lessee in operating the road. *Harmon v. Columbia etc. R. R. Co.*, 686.
20. LIABILITY FOR ACT OF LESSEE. — A railroad company cannot escape the obligations which it assumed in accepting its charter by leasing its road to another, whether the injury complained of arises from a defective track or from carelessness in running trains. *Id.*
21. RAILWAY COMPANY NOT LIABLE TO EMPLOYEE OF ITS LESSEE FOR INJURIES RESULTING FROM LATTER'S NEGLIGENCE. — A railway company which has leased its road to another company is not liable to an employee of the lessee company for an injury resulting from its negligence. It is, therefore, error to exclude testimony offered by a railway company defendant in an action against it to recover damages for the death of an employee, that, at the time of the accident, the railroad was not operated or controlled by the defendant company, and that the deceased was not in its service. *East Line etc. R'y Co. v. Culbertson*, 805.
22. PARALLEL AND COMPETING LINES OF RAILROAD. — A petition which charges that certain lines of railroad, by their conspiracy, contract, combination, and copartnership, have formed a consolidation of parallel and competing lines, in the absence of any exception to the vagueness or indirectness of the allegation, sufficiently alleges that the companies were owners of parallel and competing lines of railroad. *Gulf etc. R'y Co. v. State*, 815.
23. ASSOCIATION OF RAILROAD COMPANIES TO PREVENT COMPETITION ILLEGAL WHEN. — When one railroad company enters into an agreement with other railroad companies, any one of which owns or controls a competing line of railroad, by which it subjects itself to the government of a body appointed by all the parties to the agreement, it places itself under the control of such other company, and violates the constitution of Texas. And if one company is prohibited from making such a contract, two or more are so prohibited. The extent of the control is immaterial. Nor does it make any difference that any member of such association may withdraw from it, or that no charges had been made or agreed upon in excess of the rates fixed by statute. *Id.*
24. INTERSTATE COMMERCE — STATE CANNOT REGULATE. — State cannot control combinations of railroad companies not chartered by it in transporting

freight to and from other states; but if railroad companies are chartered by the state, and two or more of them are parallel and competing lines, and they combine with others not subject to control by the state for a purpose prohibited by its constitution, such combination will be unlawful and may be enjoined. *Id.*

See CARRIERS; CORPORATIONS; MASTER AND SERVANT.

RECEIPTS.

See EVIDENCE, 10.

REGISTRATION.

THE DOCTRINE THAT THE RECORD OF A DEED IS CONSTRUCTIVE NOTICE applies only against subsequent purchasers and encumbrancers. *Karns v. Olney*, 101.

See NOTICE.

REPLEVIN.

1. PETITION IN ACTION OF REPLEVIN WHICH FAILS TO ALLEGE the unlawful detention of the property by the defendant as against the plaintiff is fatally defective, and should be so held, even upon objection to the introduction of any evidence made at the beginning of the trial; and the fact that the affidavit filed in the case to obtain an order of delivery contained such an allegation will not cure the defect in the petition. *Wilkie v. Williams*, 281.
2. JUSTIFICATION OF OFFICER IN REPLEVIN FOR ATTACHED PROPERTY. — When an officer attaches property found in the possession of a stranger claiming title, in an action of replevin by such stranger, the officer, to justify his possession, must not only prove that the attachment defendant was indebted to the attachment plaintiff, but that the attachment was regularly issued. *Williams v. Eikenberry*, 517.
3. FRAUD, WHEN ADMISSIBLE IN AN ACTION OF REPLEVIN OR OF CLAIM AND DELIVERY. — In an action to recover possession of personal property, where the plaintiff alleges that he is the owner and entitled to the immediate possession thereof, and that it is unjustly detained by defendant, evidence is admissible to show that the property was obtained from the plaintiff by false and fraudulent representations, and that defendant is not a purchaser thereof for value and in good faith. *Benesch v. Wagner*, 254.

RIPARIAN RIGHTS.

See WATERCOURSES.

SALES.

WARRANTY OF QUALITY. — A SOUND PRICE REQUIRES SOUND PROPERTY, and a contract for the sale of corn must be read as if the words were added, "corn warranted sound." *Bulwinkle v. Cramer*, 645.

See AGENCY, 5; EQUITY, 11; FRAUD, 2-5.

SET-OFF.

See NEGOTIABLE INSTRUMENTS, 4; PARTNERSHIP, 3.

SIDEWALKS.

See MUNICIPAL CORPORATIONS, 22-23, 30, 31.

SLANDER.

See LIBEL AND SLANDER.

SPECIFIC PERFORMANCE.

See LACHES, 1.

STATUTE OF FRAUDS.

See MASTER AND SERVANT, 5.

STATUTES.

1. LAWS PASSED FOR ONE PURPOSE, and under one title or category, cannot be made to do duty, under a foreign enactment, which was not in any way within their contemplated range. *Brown v. Buck*, 433.
2. CONSTRUCTION. — An act amendatory of an act which went into effect upon its passage also goes into effect at the time such amendment is passed. *City Council v. O'Donnell*, 728.
3. CONSTRUCTION. — An act amendatory of an act, but which does not change the nature of the offense, nor the nature or amount of evidence necessary to prove the charge, nor the nature or amount of punishment, but simply changes the mode of trial, is not an *ex post facto* law. *Id.*
4. ERRORS IN PUNCTUATION IN STATUTE WILL BE DISREGARDED if the meaning is obvious. *Bradstreet Co. v. Gill*, 768.
5. IT NEED NOT AFFIRMATIVELY APPEAR FROM THE JOURNALS OF THE TWO HOUSES OF THE LEGISLATURE that every act required to be done in the enactment of a law has been done. Therefore, a statute cannot be avoided by proving that such journals failed to mention some act which the constitution commands to be done in its enactment. *People v. Dunn*, 118.
6. STATUTE REMEDIAL, WHAT IS. — A statute imposing liabilities upon railroad companies for all damages by fire that is set out or caused by the operation of its road is remedial in its nature, and applies to corporations which have obtained their charters before as well as since its passage, and should receive from all courts such reasonable and liberal interpretation as will justly promote its object. *Union P. Ry Co. v. De Bush*, 221.
7. COMMON LAW, AS MODIFIED by constitutional and statutory law, judicial decisions, and the condition and wants of the people, is enforced in Kansas in aid of the general statutes. *City of Parsons v. Lindsey*, 290.

SUNDAY.

1. SUNDAY IS DIES NON JURIDICUS, by common law, and all judicial proceedings which take place on that day, where the common-law rule is in force, are void. *City of Parsons v. Lindsey*, 290.
2. VERDICT OF JURY MAY BE RECEIVED ON SUNDAY, but a judgment rendered on that day is void, and cannot be enforced or sustained. *Id.*

See CONTRACTS, 7.

SURETYSHIP.

1. CONTRACT OF SURETYSHIP IS CONSTRUED STRICTLY in favor of the surety. He has a right to stand upon the very terms of his contract, and any alteration therein made without his consent is fatal to his obli-

gation, whether he is injured thereby or not, and although it may appear to be to his advantage. But alterations which operate to discharge the surety must be such as are material, and alterations in the writing made by a third person are, in legal contemplation, wholly immaterial, and do not change the legal import of the instrument, nor discharge the surety. *Anderson v. Bellenger*, 46.

2. **WHEN SURETY IS NOT DISCHARGED BY INSERTION OF NAME OF ADDITIONAL CO-OBLIGOR.** — A statutory claim bond, having been signed by two sureties and their principal, was delivered to and accepted and approved by the sheriff, who then procured and accepted the additional signature of a third person as surety. In such case the act of the sheriff in inducing and accepting the signature, and the act of the third person in signing, are to be regarded as the unauthorized acts of strangers to the contract, and the liability of the original sureties is not affected thereby. *Id.*
3. **BONDS—DEFENSE BY SURETY TO ACTION ON.** — In an action on a statutory claim bond, a plea by one of the sureties averring that he was fraudulently induced by the sheriff to sign the bond, under a mistake of fact, after it had been accepted and approved by the sheriff with the signatures of the other two sureties only, is good. *Id.*

See BONDS; OFFICE AND OFFICERS, 2.

TELEGRAPH COMPANIES.

1. **TELEGRAPH COMPANY NEED NOT BE INFORMED THAT SENDER OF MESSAGE IS ACTING AS AGENT** for another person, who pays the charges, and for whose benefit the transmission of the message is sought, where it is not shown that the agents of the company would have done more or acted differently under the contract if they had known that the sender was the agent of such other person. *Western Union Tel. Co. v. Broesche*, 843.
2. **TELEGRAPH COMPANY CANNOT AVOID LIABILITY FOR FAILURE TO DELIVER MESSAGE** by showing that the office at the place of delivery was closed at the time when the message was received for transmission. *Id.*
3. **MENTAL SUFFERING MAY BE CONSIDERED AS ELEMENT OF DAMAGE** in an action for the non-delivery of a telegram, the wording of which showed that it demanded prompt delivery. *Id.*
4. **STIPULATION REQUIRING TELEGRAPHIC MESSAGE TO BE REPEATED IS NO DEFENSE** to an action to recover damages for delay or failure in delivering the message. *Id.*
5. **TELEGRAPH COMPANY IS LIABLE FOR SUCH DAMAGE AS IS DIRECT AND NATURAL RESULT** of its failure to deliver a message intrusted to it for delivery, without regard to the degree of its negligence, where the message on its face discloses the necessity for its prompt transmission and delivery. *Id.*

TELEPHONES.

See DEEDS, 2.

TENDER.

1. **WHAT SUFFICIENT.** — A tender of money made in the pleadings, followed by a payment thereof into court, is a sufficient tender. *Werner v. Nugent*, 792.
2. **TENDER OF PURCHASE-MONEY IN SUIT TO ANNUL SHERIFF'S SALE.** — A tender of the purchase-money by a defendant in execution, in a suit brought

by him to set aside a sheriff's sale of land under the execution, obviates the necessity of making the state a party to such suit. *Id.*

TORTS.

See CORPORATIONS, 14; CONFLICT OF LAWS, 3; MUNICIPAL CORPORATIONS, 19-21.

TRESPASS.

See CO-TENANCY, 4-6.

TRIAL.

1. **REASONABLE TIME TO ANSWER AND PREPARE FOR TRIAL SHOULD BE GIVEN, WHEN.** — Where, just before going to trial, it is discovered that the files have been mislaid and cannot be found, and the court thereupon permits the plaintiff to file a substituted petition which is much broader than the one for which it is filed, and which in fact raises new issues in the case, the defendant should be given a reasonable time in which to answer and prepare for trial, and it is error to compel the defendant, under such circumstances, to answer the substituted petition and go to trial at once. *Fremont etc. R'y Co. v. Marley*, 482.
2. **COURT MAY LIMIT TIME OF COUNSEL IN FELONY TRIAL** in their arguments to the jury, provided the time be not made so short as to manifestly prejudice the rights of the prisoner. *State v. Shores*, 875.
3. **IMPROPER REMARKS OF COUNSEL ARE NOT GROUND FOR REVERSAL**, unless it appears from the record that the prisoner's rights were prejudiced thereby. *Id.*
4. **RIGHT OF COUNSEL TO COMMENT UPON ABSENCE OF WITNESS.** — While defendant's counsel has the right to comment upon the absence of a material witness, he has no right to ask instructions that his absence militated against plaintiff, or that the jury might guess that she was not called because her version of the transaction would have hurt his case. *Cross v. Lake Shore etc. R'y Co.*, 399.
5. **JURY AND JURORS — WHEN VERDICT IS RETURNED, JURY MAY BE ASKED** upon which count it was rendered; and if the foreman answers in the presence and hearing of the whole panel, their assent to his answer is presumed, if no juror dissents. *Cross v. Grant*, 607.
6. **A CHALLENGE FOR CAUSE IS PROPERLY SUSTAINED** where, in an action against a railroad company, a juror answers that he has had some special accommodations from the defendant, expects to continue business over its road, and that that fact might possibly affect his verdict, and that if the case should be evenly balanced, he would give the benefit of the doubt to the company. *Denver etc. R. R. Co. v. Driscoll*, 243.
7. **QUESTION WHETHER EVIDENCE SHOULD BE EXCLUDED** as being too remote is one of fact properly determined at the trial. *Cross v. Grant*, 607.
8. **ADMISSION OF RECORDS TO ESTABLISH TITLE, IN DISCRETION OF COURT, WHEN.** — In an action for injury to growing crops and to the land, the question of the admission of records to establish the plaintiff's title is, to a great extent, one for the trial court, and unless there is a clear abuse of discretion, its judgment will not be reversed on that ground. *Fremont etc. R'y Co. v. Marley*, 482.

9. EVIDENCE — IT IS LARGELY IN DISCRETION OF TRIAL COURT TO PERMIT the preliminary proof to the introduction of death-bed statements of deceased to be given to the court in the presence of the jury. But good practice would require this evidence to be heard in the absence of the jury, if properly insisted upon. *State v. Furney*, 282.
10. CHARGE NOT APPLICABLE TO CASE MADE BY PLEADINGS OR PROOF is properly refused. *East Line etc. R. R. Co. v. Scott*, 758.
11. REQUEST FOR INSTRUCTIONS TO THE JURY involving an opinion on disputed facts is properly refused. *Avinger v. South Carolina R'y Co.*, 716.
12. REQUISITES OF CHARGE TO JURY. — Charges to juries should, if possible, be plain, simple, and easily understood, free from obscurity, involvement, ambiguity, metaphysical intricacy, or tendency to mislead; and a charge obnoxious to any of these objections should be refused, although on dissection it may assert a correct legal proposition. The office and purpose of a charge is to enlighten the jury, and it should go no further than to state plain propositions of law, applicable to the tendency or varying tendencies of the evidence. *Louisville etc. R. R. Co. v. Hall*, 84.
13. INSTRUCTIONS — PROOF TO A MORAL CERTAINTY. — Defendants are not entitled to have a jury instructed that their fault or negligence must be established to a moral certainty when the jury have already been told by the court "that plaintiff, in order to recover in this action, must prove to your satisfaction that defendants have been guilty of some fault or negligence, and must also prove what that fault or negligence was, and this plaintiff must do by a preponderance of evidence." The effect of such instruction is the same as if the jury had been instructed that they must be convinced by the evidence to a moral certainty. *Treadwell v. Whistler*, 178.
14. A FINDING OUTSIDE OF THE ISSUE MUST be disregarded. *Alberts v. Branham*, 200.
15. COMMON-LAW PRACTICE. — When a case is tried by a common-law jury, one verdict settles the whole issue, and, unless set aside, furnishes the complete basis of judgment, which cannot in anything depart from it, and there is, and can be, no issue which the jury do not dispose of. *Brown v. Buck*, 438.

See APPEAL AND ERROR.

TROVER.

See VENDOR AND VENDER, 2.

TRUSTS AND TRUSTEES.

1. LAW DOES NOT SUFFER TRUST TO FAIL FOR WANT OF TRUSTEE, and this principle applies as well when, without legal remedy, the fiduciary failure would be partial as when it would be total. *Pearson v. Concord R. R. Corp.*, 590.
2. ADMINISTRATOR IS TRUSTEE CHARGED WITH MANAGEMENT OF TRUST ESTATE under the rules of the probate law, and he cannot plead his own laches as a bar to the jurisdiction of the probate court to compel him to make settlement of such trust estate. *Mah v. Brown*, 823.
3. RELEASE AND DISCHARGE of a trustee signed and sealed by all parties in interest, and obtained by the trustee by fair and just means, will operate to discharge him from all adult parties interested, and as to them

the statute of limitations begins to run from the date of the release. As to an infant party who signs the release, he has one year after attaining his majority in which to contest the validity of the release. *Anderson v. Simms*, 711.

See CORPORATIONS, 3-5.

USAGES AND CUSTOMS.

1. **USAGE OR CUSTOM, WHAT MUST BE SHOWN TO JUSTIFY INTRODUCTION OF.** — To warrant the introduction of a usage or custom in the course of trade, it is necessary to show that it is uniform, reasonable, and notorious, and the custom must be established by a witness who is experienced in such transactions, and can testify to the facts constituting the custom. Testimony introduced to show that because of a usage certain stock was not in fact delivered is not admissible, where there is positive proof that it was not delivered, and there is nothing to show the extent of the custom or the witness's means of knowledge. *Missouri P. R. R. Co. v. Fagan*, 776.
2. **USAGE WHICH IS CONTRARY TO LAW OR PUBLIC POLICY CANNOT BE GOOD;** and therefore a custom of railroads not to receive for transportation any live-stock, unless under certain conditions modifying their common-law liability, is bad, because railroads cannot legally refuse to ship live-stock. *Id.*

See CARRIERS, 18, 19; NEGLIGENCE, 6.

VENDOR AND VENDEE.

1. **DECLARATIONS OF VENDOR AS TO TITLE INADMISSIBLE, WHEN.** — The declarations of one from whom a party obtains title to property, made after the transfer of title, and in derogation thereof, are inadmissible as against the vendee for the purpose of defeating the title. But where the vendor, testifying as a witness to prove the sale, is, on his cross-examination, asked, for the sole purpose of affecting his credibility, whether he had not, at a time subsequent to the alleged sale, offered to sell the same property, as the owner thereof, to another, and denies it, the testimony of other witnesses is admissible to impeach him. *Williams v. Eikenberry*, 517.
2. **FAILURE OF VENDOR TO RETURN MONEY RECEIVED BY HIM OF HIS VENDEE,** who obtained possession of property by false and fraudulent representations, cannot be urged as a defense by a third person, whom such vendor sues to obtain possession of such property. *Benesch v. Wagner*, 254.

See DAMAGES, 10, 11; FIXTURES, 1.

VENUE.

See CORPORATIONS, 17.

VERDICT.

See DAMAGES, 8, 9; SUNDAY, 2; TRIAL, 5.

WAGERS.

See CONTRACTS, 9-12.

WATERCOURSES.

1. **RIPARIAN RIGHTS — DAMAGES FROM JAM OF LOGS.** — In an action for damages, evidence that a booming company had possession

of a river, and was running logs thereon, which logs jammed below plaintiff's place, and that the company kept running logs against such jam, and filled up the river until the jam extended through plaintiff's farm, and above it, where it remained for a month, establishes a *prima facie* case of negligence against such company if unexplained, and makes it unnecessary for plaintiff to go further, and show lack of use of reasonable care and dispatch by the company in order to recover damages. *Witheral v. Muskegon Booming Co.*, 325.

2. **RIPARIAN RIGHTS.** — A jam of logs in a river does not, of itself, constitute negligence upon the part of a booming company running logs in such river; but the existence of such jam for a month or more, and the continued running of logs in such manner as to increase the jam during such period, does, unexplained, constitute negligence. *Id.*
3. **RIPARIAN RIGHT — RIGHTS OF LOG-BOOMERS.** — A log-owner has a right to use the stream in its natural capacity to float his logs, and is not responsible for any damage, incidentally and without his fault, arising therefrom. But he has no right to so deal with his logs, by the forming of jams or otherwise, as to cause the water to overflow the adjoining lands more than it would were the logs left to themselves and allowed to float down naturally, and without artificial interference. *Id.*
4. **RIPARIAN RIGHTS — RIGHT OF LOG-BOOMERS.** — Where a navigable river has a well-defined channel or bed between well-defined banks, the low or bottom lands upon the side of the stream that are overflowed in times of high water are not within the boundaries of such stream, and the capacity of such stream cannot be increased by artificial means so as to permit a log-owner to use at all times the full volume of water that may flow in the stream during unusual and brief freshets. *Id.*
5. **DAMAGES — NEGLIGENCE — RIGHT TO RUN LOGS DOWN STREAM.** — In an action for damages caused by the overflow of plaintiff's land from a jam of logs in a navigable stream, the defendant is not liable for any damage caused before he assumed control of the logs, or had the right to do so, and not then, if he ran the logs in a careful, diligent, and prudent manner. If he uses necessary care to prevent the formation of jams, and to break those already formed within a reasonable time after he took charge of them, or had the right to do so, and does not unnecessarily run logs against jams already formed, there can be no recovery. *Id.*
6. **EVIDENCE.** — Destruction of pasturage by negligently flooding plaintiff's land is *prima facie* evidence at least of damages to the amount of its value. *Id.*
7. **EVIDENCE.** — In an action to recover damages for the negligent flooding of plaintiff's land, and destruction of his hay thereby, evidence of the amount of hay gathered from the land the year previous to the injury complained of is admissible to show the capacity of the land for producing hay. *Id.*
8. **RIGHT OF NAVIGATION** is measured by the capacity of the stream for valuable purposes in its natural condition, and any attempt to create capacity at other times at the expense of private interests can be justified only on an assessment and payment of compensation. *Id.*
9. **PARTY HAS NO RIGHT TO COLLECT SURFACE WATER AND DISCHARGE IT** on land of another, to his damage, and if he does so, he will be liable for the damage sustained. *Fremont etc. Ry Co. v. Marley*, 482.

See COVENANTS, 2.

WILLS.

1. **CONSTRUCTION — DEVISE WHETHER SPECIFIC.** — Where a pecuniary legacy is given with directions that it be laid out in land, without specifying what land, it will be regarded as a devise of real estate for some, but not for all, purposes; and the assent of the executor is necessary to perfect the title of the legatee. Until such assent, the legacy constitutes part of the personal assets of the testator, and as such must be applied, as the other personal estate, to the payment of his debts. *McFadden v. Hefley*, 675.
2. **CONSTRUCTION — SPECIFIC LEGACY.** — A bequest of "all horses, mules, cows, hogs, wagons, farming implements, household and kitchen furniture, on said plantation," is a specific legacy. *Id.*
3. **CONSTRUCTION — SPECIFIC LEGACY.** — A bequest of personal property on a particular estate, capable of being singled out and specifically delivered, is a specific legacy. *Id.*
4. **CONSTRUCTION — SPECIFIC LEGACY.** — A bequest of the dividends arising on certain stocks, without a direct and express disposition of such stocks, carries the stocks with it, and is specific. *Id.*
5. **CONSTRUCTION — SPECIFIC LEGACY.** — A clause in a will directing the executor to dispose of all property not specifically disposed of, collect all money due, and use the interest thereon for certain purposes, and then pay the principal to the testator's children, does not create a specific legacy for them. *Id.*
6. **CONSTRUCTION — SPECIFIC DEVISE.** — A devise of the plantation on which the testator resided is specific, and cannot be abated until, first, the general legacies, and then the specific legacies, are exhausted. *Id.*
7. **CONSTRUCTION — ABATEMENT OF LEGACIES.** — For the payment of a testator's debts, specific legacies must abate before specific devises. *Id.*
8. **RULE IN SHELLEY'S CASE WHEN INAPPLICABLE.** — If the word "issue" is so qualified by additional words as to evince an intention that it is not to be taken as descriptive of an indefinite line of descent, but is used to indicate a new stock of inheritance, the rule in Shelley's Case does not apply. *Boykin v. Ascrum*, 698.
9. **CONSTRUCTION OF DEVISE FOR LIFE.** — Under a devise to A for life, and after his decease to his lawful issue absolutely and in fee, but if A should die without lawful issue at the time of his death, then to B, A takes a life estate, with limitation over to his issue in fee as purchasers. *Id.*

WITNESSES.

1. **SHERIFF IS NOT DISQUALIFIED FROM BEING WITNESS** because he has the jury in charge; nor does the fact that he is a witness disqualify him to keep the jury in his custody. *State v. Shores*, 875.
2. **WITNESS NOT PERMITTED TO TESTIFY AS TO AMOUNT OF DAMAGES SUSTAINED, WHEN.** — On the trial of an action to recover damages for an injury to growing crops, a witness who possesses the requisite knowledge may testify as to the value of the crops destroyed, or if only partially destroyed, the extent of the injury; but he cannot be permitted to testify directly as to the amount of the damages sustained. That question is one for the jury to determine upon the evidence. *Fremont etc. Ry Co. v. Marley*, 482.
3. **EXPERT EVIDENCE.** — In an action to recover damages caused by falling into a hole near a recognized way, used by people in going to and coming

from a railway depot, the testimony of a civil engineer that the hole was a dangerous place, and needed protection, is admissible. *Oress v. Lake Shore etc. R'y Co.*, 399.

4. RAILROAD SUPERINTENDENT WHO HAS BEEN EMPLOYED ON RAILROADS for twenty years, and who has served as fireman, brakeman, baggage-master, yard-master, and train-master, may give his opinion as an expert as to the merits or demerits of "whipping-straps" as cautionary signals to brakemen of the approach of the train to low bridges, and whether or not they were generally in use on railroads regarded as well regulated; but he could not give his opinion as to the prudent management of the defendant's railroad. *Louisville etc. R. R. Co. v. Hall*, 84.
5. COMMERCIAL AGENCY'S REPORTS, EXPERT TESTIMONY TO EXPLAIN.—In an action against a commercial agency for publishing an alleged libelous report of the plaintiff's standing as a merchant, testimony of witnesses in possession of the key to the defendant's reports is admissible to explain what is indicated by reporting therein a merchant's standing "in blank," where it is alleged in plaintiff's petition that he was reported in blank. But the opinion of a witness as to the general effect of such a rating upon the credit of the plaintiff in commercial circles is inadmissible. It is for the jury to decide upon the general effect of the libel upon the plaintiff's character and credit as a merchant, without the influence of the opinions of witnesses. *Bradstreet Co. v. Gill*, 768.
6. IMPRACHING A WITNESS.—The question asked one witness concerning another, "From what you know of his truth and veracity, would you believe him under oath?" is incompetent, as calling for the opinion of a witness based upon his personal knowledge, and not upon the general reputation of the witness sought to be impeached. *Beneck v. Wagner*, 254.

See TRIAL, 4.

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